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In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

MOTION OF THE UNITED STATES FOR MODIFICATION OF DECREE AND SUPPORTING MEMORANDUM

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INDEX

	Page
Motion for Modification of Decree	1
Memorandum in Support of Motion for Modification of Decree	5
A. Introduction	5
B. Boundary Lands	8
1. Nature and ripeness of the claims	9
a. Boundaries "finally determined"	10
b. Adjudication of "private land title"	14
2. Particulars of the claims	17
a. Fort Mojave Reservation	17
b. Chemehuevi Reservation	19
c. Colorado River Reservation	20
d. Fort Yuma Reservation	21
e. Cocopah Reservation	22
C. Omitted Lands	23
1. Nature and viability of the claims	23
2. Particulars of the claims	30
a. Fort Mojave Reservation	30
b. Chemehuevi Reservation	31
c. Colorado River Reservation	31
d. Fort Yuma Reservation	31
e. Cocopah Reservation	32

Supporting Memorandum—Continued Page

D. Recapitulation 32

E. Conclusion 33

CITATIONS

Cases:

Bryan v. *Itasca County*, 426 U.S. 373 6
Cappaert v. *United States*, 426 U.S. 128..... 28
Cocopah Tribe v. *Morton*, No. CIV-70-573-PHX-WEC (D. Ariz. May 12, 1975) 22
Commissioner v. *Sunnen*, 333 U.S. 591..... 24
Conrad Investment Co. v. *United States*, 161 F. 829 29
Fort Mojave Tribe v. *LaFollette*, Civ. No. 69-324MR (D. Ariz. Feb. 7, 1977) 19
New Jersey v. *New York*, 347 U.S. 995, modifying 283 U.S. 805 26
Poafpybitty v. *Skelly Oil Company*, 390 U.S. 365 6
St. Paul & Pacific R.R. Co. v. *Northern Pacific R.R.*, 139 U.S. 1 15
Sea-Land Services, Inc. v. *Gaudet*, 414 U.S. 573 24
Trbovich v. *United Mine Workers*, 404 U.S. 528 6
United States v. *Ahtanum Irrigation District*, 236 F.2d 321 29
United States v. *Brigham Young, et al.*, No. 72-3058-DWW (C.D. Cal. Dec. 12-13, 1976, Apr. 6, 1977) 20
United States v. *Minnesota*, 270 U.S. 181.. 15

Cases—Continued

	Page
United States v. *Robert H. Clark, et al.*, No. 72-1625-RJK (C.D. Cal. Apr. 22, 1977)	20
United States v. *Samuel Curtis, et ux.*, No. 72-1624-DWW (C.D. Cal. Jan. 7, 1977)	20
Winters v. *United States*, 207 U.S. 564	28
Wisconsin v. *Illinois*, 388 U.S. 426, modifying 281 U.S. 696	26

Statute:

Act of June 24, 1974, 88 Stat. 266	23

Miscellaneous:

6 R. Clark, *Water and Water Rights* (1972)	26
Rule 60(b), Fed. R. Civ. P.	25

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STATE OF ARIZONA, COMPLAINANT

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MOTION FOR MODIFICATION OF DECREE

The United States of America, by the Solicitor General, moves the Court for entry of a supplemental decree, modifying the decree of March 9, 1964, and the injunction in Article II thereof, so as to permit additional diversions of water from the mainstream of the Colorado River for the use of the Fort Mojave, Chemehuevi, Colorado River, Fort Yuma and Cocopah Indian Reservations, in the annual quantities hereinafter specified.

In support of this motion, the United States alleges:

1. The boundaries of the several Indian Reservations above named have been finally determined, whether by Act of Congress, by final judgment of a

court of the United States or by final action of the Department of the Interior.

2. These boundary adjustments, effected since the entry of the decree of March 9, 1964, have confirmed to the Indian Reservations additional practicably irrigable lands for which the United States reserved water rights, as follows:

(a) The Fort Mojave Reservation, 3,000 acres, all within the State of California;
(b) The Chemehuevi Reservation, 150 acres, all within the State of California;
(c) The Colorado River Reservation, 3,110 acres, all within the State of California;
(d) The Fort Yuma Reservation, 5,500 acres, of which 4,200 acres lie within the State of California and 1,300 acres within the State of Arizona;
(e) The Cocopah Reservation, 1,112 acres, all within the State of Arizona.

3. There are within the boundaries of the several Indian Reservations as defined for the purposes of the decree of March 9, 1964, practicably irrigable lands which were erroneously omitted from consideration and which are entitled to reserved water rights, as follows:

(a) The Fort Mojave Reservation, 1,250 acres, of which 100 acres lie within the State of California, 1,000 acres within the State of Arizona and 150 acres within the State of Nevada.
(b) The Chemehuevi Reservation, 500 acres, all within the State of California;

(c) The Colorado River Reservation, 15,000 acres, of which 2,000 acres lie within the State of California and 13,000 within the State of Arizona;

(d) The Fort Yuma Reservation, 500 acres, all within the State of California;

(e) The Cocopah Reservation, 33 acres, all within the State of Arizona.

4. Accordingly, the several Indian Reservations are entitled, with the priority dates recited in Article II of the decree of March 9, 1964, and in addition to the quantities there specified, to annual diversions of mainstream water from the Colorado River in quantities sufficient to irrigate the additional acreage specified in paragraphs 2 and 3 above, or in the following quantities, whichever is less:

(a) The Fort Mojave Reservation, 27,455 acre-feet, of which 20,026 acre-feet are chargeable against the allocation of the State of California, 6,460 acre-feet against the allocation of the State of Arizona and 969 acre-feet against the allocation of the State of Nevada;

(b) The Chemehuevi Reservation, 3,880 acre-feet, all chargeable against the allocation of the State of California;

(c) The Colorado River Reservation, 120,794 acre-feet, of which 30,854 acre-feet are chargeable against the allocation of the State of California and 89,940 acre-feet against the allocation of the State of Arizona;

(d) The Fort Yuma Reservation, 40,020 acre-feet, of which 31,352 acre-feet are chargeable against the allocation of the State of Cali-

fornia and 8,668 acre-feet against the allocation of the State of Arizona;

(e) The Cocopah Reservation, 7,294 acre-feet, all chargeable against the allocation of the State of Arizona.

5. The Court's jurisdiction to entertain the present motion and to enter the proposed supplemental decree was appropriately retained by Article II(D)(5) and Article IX of the decree of March 9, 1964.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 8, Original

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

MEMORANDUM IN SUPPORT OF MOTION FOR MODIFICATION OF DECREE

A. INTRODUCTION

The present motion is submitted by the United States as trustee for, and guardian of, the Tribes of the Fort Mojave, Chemehuevi, Colorado River, Fort Yuma and Cocopah Indian Reservations on the lower Colorado River. The United States has been a party in the case since 1953 (344 U.S. 919) and has, throughout the litigation, represented the interests of the five Tribes. See 373 U.S. 546, 595. We accordingly deem it appropriate, once again, to assert the rights of the several Tribes which are now ripe for adjudication. We do so, however, only after exercis-

ing our independent judgment and we do not, in all instances, advance the tribal claims to the full extent that they have previously been presented to the Court.[1]

Our motion seeks a modification of the original Decree of March 9, 1964 (376 U.S. 340) to increase, by a relatively small margin, the allocation of mainstream water for the use of the five Indian Reservations. These rights to additional diversions are asserted in respect of Reservation lands for which no allocation has thus far been made. In part, these are areas once treated as being outside the Reservations but since determined to be within their true boundaries ("boundary lands"). In other part, we claim water for lands which, although concededly part of a Reservation, were not, for one reason or another, asserted to be "practicably irrigable" during the original proceedings and which were accordingly omitted from consideration in calculating the allocation of mainstream water to the several Reservations ("omitted lands").

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[1] We refer to the Petitions in Intervention submitted by the several Tribes and the accompanying Motions for leave to file. Although the Court has taken no action on those motions, we are filing now in accordance with our undertaking to the Court and to the Tribes to submit the claims before the end of the year. We do not, of course, mean to preempt the tribal motions and we continue to support the Tribes in their plea for leave to intervene. See *Bryan* v. *Itasca County*, 426 U.S. 373, 388-389 n.14 (1976); *Poafpybitty* v. *Skelly Oil Company*, 390 U.S. 365, 374 (1968); cf. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538-539 (1972). So, also, we adhere to the Joint Motion for the Entry of a Supplemental Decree which we filed together with the State parties and which two of the Tribes have endorsed.

Because different objections are interposed, we separately discuss the additional diversion rights sought on behalf of the "boundary lands" and those asserted for "omitted lands." But we stress, at the outset, that both our submissions accept—without questioning or seeking to re-open—all that has so far been decided in the case. Thus, we begin with the controlling principle established by the Court's ruling in 1964: that each of the Reservations is entitled, as a present perfected right, to "enough water * * * to irrigate all the practicably irrigable acreage on the reservations." 373 U.S. at 600. And we adhere to the formula already settled for determining the maximum annual diversion per acre in each case. See 376 U.S. at 344-345.[2] Nor is there any occasion to re-examine the allocations already made. The present motion only invites the Court to consider new areas, for which no determinations have yet been made, and to apply to them the old rules.

The propriety of this plea for additional water would be debatable if the original allocation for each

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[2] As the Decree makes clear, the established rule is that each Reservation is entitled to enough water to irrigate all practicably irrigable acreage, but not to exceed a total computed on the basis of a fixed number of acre-feet of water per acre of land. This formula varies from Reservation to Reservation. The basis of the maximum allocation in each case is as follows:

Fort Mojave	6.46 acre-feet per acre
Chemehuevi	5.97 acre-feet per acre
Colorado River	6.67 acre-feet per acre
Fort Yuma	6.67 acre-feet per acre
Cocopah	6.37 acre-feet per acre

Reservation had been the end-product of a complex weighing of competing considerations, which it might be both difficult to identify and inequitable to reassess two decades later.[3] But there is no such problem here. The permitted diversions were fixed in strict relation to the number of irrigable acres believed to lie within each Reservation, applying a predetermined formula. Accordingly, any correction is a mere arithmetic computation—once it is determined that additional irrigable acreage within a Reservation was erroneously omitted from the original calculation. It was no doubt with the relative simplicity of the task in mind that the Court itself provided for later adjustment of water allocations in the event Reservation boundaries were subsequently altered. 376 U.S. at 345. The present motion does no more than to invoke the same procedure for "omitted lands" as well as "boundary lands."

B. BOUNDARY LANDS

One aspect of the present motion (as we have said) is a request for additional mainstream diversion rights attributable to the adjustment of Reservation boundaries and the inclusion within the Reservations of irrigable acreage not originally taken into account in computing entitlement. This plea, we submit, is

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[3] The evidentiary trial before the Special Master was concluded on August 28, 1958, and the Master's Report was submitted to the Court on December 5, 1960. See Report of the Special Master, No. 9, Orig., O.T. 1960, at 3, 361; 364 U.S. 940.

both appropriate and timely, now that the boundaries of all five Reservations have been finally determined.

1. NATURE AND RIPENESS OF THE CLAIMS

Before particularizing the claims, we stress the limited question we present to the Court in respect of the "boundary lands." It is simply how much additional water (applying a formula already settled) should be adjudicated for the use of each Reservation on account of irrigable acreage newly determined to be within the Reservation boundaries. The Court need not, in our view, redetermine the boundaries or review administrative action fixing them. Nor is it the Court's task, we suggest, to resolve any private dispute between the Tribe and alleged patentees to any part of these areas. In sum, our Motion asserts that a stated number of irrigable acres have been confirmed to a Reservation and asks the Court for additional water accordingly, at a rate-per-acre previously fixed. The only issue open here is whether the tendered acreage is in fact "practicably irrigable" and thus entitled to mainstream water.

We belabor the point because of contrary suggestions by some of the other parties in their responses to the tribal motions for leave to intervene. Thus, the California Urban Agencies contest both a final district court judgment and a Secretarial Order fixing Reservation boundaries as effective for water allocation purposes and ask this Court to redetermine the matter *ab initio*. Response of the Metropolitan Water District of Southern California, etc., filed June 1, 1978,

at 4-5, 6, 9, 11. The State of Arizona, on the other hand, opposes the additional water claims for boundary lands as premature until "lower court decisions" have resolved the "title disputes." Response of the State of Arizona, etc., filed June 5, 1978, at 3-5.[4] And an amicus curiae seems to suggest that this Court cannot make a water allocation with respect to the "boundary lands" without also adjudicating private land title claims there. Motion of Donald D. Stark for Leave to File Amicus Curiae, etc., filed September 8, 1978, at 4, 5, 6, 10.

In our view, the matter is far less complicated and there is no occasion for a further postponement. Both the "finality" of the boundary determinations and the necessity for adjudicating "land titles" are, we believe, easily resolved by looking to the Court's treatment of these questions in 1964. If we follow the indications then given, the objections now advanced are seen to be wholly artificial obstacles.

a. *Boundaries "finally determined"*

In the original proceedings before the Special Master questions arose as to the correct western boundary of both the Fort Mojave and Colorado River Reservations, which the Master sought to decide. Report,

[4] The States of California and Nevada and the other California parties presumably also deny the conclusiveness of the present judicial or administrative boundary determinations. See Response of the States of Arizona, California and Nevada, etc., filed January 25, 1978, at 25-26. They do not, however, indicate how, in their view, the boundaries should be "finally determined."

supra, at 274-278, 283-287. The Court, however, disagreed, holding that it was "unnecessary to resolve those disputes here." 373 U.S. at 601. It appears the Court then contemplated that the Secretary of the Interior would be free "to deliver water to either [of the disputed] area[s]" and that the boundaries need be settled only in the event of "some future refusal" by him to permit such diversions. *Ibid.* But the Decree subsequently entered effectively enjoined the Secretary from doing so. 376 U.S. at 341, 343-345. Instead, it was provided that "the quantities fixed [by the Decree in respect of the Fort Mojave and Colorado River Reservations] shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Id.* at 345.

The upshot is that, absent agreement (which has not been possible), only this Court can make the necessary upward adjustment in permitted diversions for Reservations whose true boundaries have been determined to encompass irrigable areas not included in the original allocations. And, of course, the Court must be deemed to have retained jurisdiction for that purpose.[5] Moreover, while Article II(D)(5) of the original Decree (376 U.S. at 345) expressly refers only to the Fort Mojave and Colorado River Reserva-

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[5] In our view, continuing jurisdiction is retained for this purpose by Article II(D)(5) of the original Decree. 376 U.S. at 345. But, at all events, the general reservation of jurisdiction in Article IX would encompass the matter. 376 U.S. at 353.

tions, fundamental equitable principles require that the same rule apply to the other Reservations whose boundaries likewise have been finally determined to include acreage not known to be encompassed in 1964.

So much appears to be agreed on all sides and is, indeed, expressly contemplated by the Supplemental Decree proposed by the State parties. As we understand, the only basis of any objection to the present motion—so far as it seeks additional water for the "boundary lands"—is the contention that none of the Reservation boundaries are yet "finally determined." The suggestion is that a decision by the Secretary of the Interior, although administratively final, is not a sufficient determination for the purpose until and unless it has survived judicial challenge in this or another Court. The point is quickly answered.

It is self-evident that in entering the quoted provision of the Decree in 1964, this Court was not undertaking itself later to resolve any Reservation boundary questions. As we have noted, the Court had just rejected the Special Master's attempt to do that and it is not to be supposed that the Court, in 1964, was contemplating that the same issues would return here at some future date after being referred to a new Master. Plainly, the final provision to Article II(D)(5) means something quite different: if the parties cannot agree, this Court will adjust the *water* allocation in respect of a Reservation whose boundaries are *elsewhere* "finally determined" to include acreage not taken into account in 1964.

The remaining question is whether the Court impliedly required judicial approval of any Reservation boundary adjustment before it would consider a request for additional water. There is no basis for supposing that was intended. On the contrary, we must assume that, except as there is an express difference, the Decree follows the Court's Opinion, and we have seen that the Opinion contemplated resolution of the boundary questions by the Secretary of the Interior. Moreover, if any party held a different view, one would expect suggestions for explicit language conditioning any adjustment upon judicial approval of boundary changes. But there was none: although all parties submitted different proposals for other provisions of the Decree, everyone accepted the wording of the proviso to Article II(D)(5) in its present form. See Agreed Provisions for Proposed Final Decree in No. 8, Orig., O.T. 1963 (Dec. 1963), at 2, 10.

At all events, any different approach would be most extraordinary. After all, the Interior Department's survey of the boundaries of Indian Reservations, typically surrounded by public domain lands of the United States, are not usually subjected to judicial challenge. And yet, for many purposes, including questions of criminal jurisdiction, one must treat those boundaries as "finally determined." So here. It would be wholly arbitrary to consider the Reservation boundaries as they were understood in 1964 to be sufficiently "determined" to support a specific water allocation calculated on acreage—albeit no court judgment had ever vindicated the survey—but to deny comparable affect

to subsequent dependent surveys of the boundaries because no court had approved them.

We need only ask whether the Court intended that the States involved be free to hold up indefinitely the contemplated adjustment of the water allocation for a Reservation merely by failing judicially to challenge final administrative action fixing the boundary. The question answers itself. The fact is that none of the parties to this suit has sought to challenge the Secretary's determination in district court proceedings, although, in one case, the decision was entered almost a decade ago, and in every other instance except one, the action has been promulgated for several years. The claim for additional water in respect of the restored areas of the affected Reservations is fully ripe for adjudication.

b. *Adjudication of "private land title"*

It is suggested in some quarters that the Court cannot act on the present motion—so far as it relates to "boundary lands"—until this, or another Court, adjudicates every claim of private title within the restored Reservation boundaries. But that problem was faced and resolved in the original proceedings and the same solution can conveniently be followed now.

During the hearings before the Special Master it was alleged that certain lands within the boundaries of the Fort Mojave Reservation were held by private patentees from the State of California, which obtained the tracts under the Swamp Lands Act of 1850

before the Reservation was established, and that others were held under grants to the Southern Pacific Railroad pursuant to the Act of July 27, 1866, also before the creation of the Reservation. Such claimants, if they proved their allegations, would hold good title, regardless of the date patents actually issued. See *United States* v. *Minnesota*, 270 U.S. 181, 204-212 (1926); *St. Paul & Pacific R. R. Co.* v. *Northern Pacific R. R.*, 139 U.S. 1, 5 (1891). Believing that, in those circumstances, the *Winters* reserved water doctrine would not be applicable to such lands, the Master concluded that he should exclude any validly patented acreage within the Reservation when calculating its mainstream diversion rights. But he did not deem himself obliged to decide the several private claims and contented himself with suggesting a proviso in the Decree. Report, *supra*, at 280, 282, 283, 351-352.[6]

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[6] The Special Master's Report is internally inconsistent in minor respects. Thus, although he found that there were both Swamp Lands Act and Southern Pacific Railroad grants within the Fort Mojave Reservation (Findings 6 and 7, Report, *supra*, at 280), the Master, in his Findings of Fact, himself deducts only the former acreage and provides only for future deduction of accretions thereto, when ascertained (Findings 14 and 16, *id.* at 281-282)—and makes no provision with respect to the railroad grant acreage. Yet, in his Conclusions of Law, and in his Recommended Decree, he provides for future deduction of *both* Swamp Lands Act and Southern Pacific grants, as well as accretions thereto (Conclusions 6, *id.* at 283; Proposed Decree, Art. II(C)(2)(e), *id.* at 351-352). The parties accepted the Master's proposed provision and the Court adopted it, without noticing that, in one respect at least, there is a double deduction. The matter would be resolved by the proposed Supplemental Decree pending before the Court, which eliminates the requirement of any deduction.

The Court evidently agreed that this was the appropriate course and adopted the Master's proposal. Decree, Art. II(D)(5), 376 U.S. at 345.

A like proviso in a modified decree would equally protect any private rights, as well as preserve State objections that "reserved" water ought not be allocated for land never held by an Indian Tribe. The pendency of such claims—some of them not yet judicially asserted[7]—should not delay adjudication of additional water for the "boundary lands." At best, the patented areas represent a very small fraction of the restored acreage,[8] and to await resolution of those claims would be to let the tail wag the dog.[9] Moreover, if every such claim, meritorious or not, must be

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[7] Mr. Stark's *amicus* brief refers to Swamp Land Act patentees in "boundary lands" of the Fort Mojave Reservation (at 7). Although these landowners objected to the dependent re-survey affecting that Reservation—an objection finally overruled October 10, 1978—they have not asserted their title in judicial proceedings.

[8] Here and elsewhere we use the term "restored" in a non-technical sense to identify lands which were at all times part of a Reservation but which were mistakenly treated as outside Reservation boundaries by the Special Master in the original proceedings and have since been confirmed as within those boundaries.

[9] Thus, the only relevant claims of which we are aware affect some 244 acres, plus accretions, out of a total of approximately 3,500 in the "Hay and Wood Reserve" recently restored to the Fort Mojave Reservation. The judicial proceedings affecting the Olive Lake and Ninth Street Cut-Offs in the Colorado River Reservation (*amicus* brief at 8-10) are not involved here, since the Court has already adjudicated water with respect to those areas.

finally settled before the boundary water adjustment is made, implementation of the tribal right could be held up indefinitely. We submit the old formula will serve once again to preserve all rights while assuring that justice to the Tribes is not longer delayed.

2. PARTICULARS OF THE CLAIMS

Having canvassed the applicable principles governing the allocation of additional water for lands restored to the Reservations, we now descend to particulars. We briefly outline the boundary adjustments affecting each Reservation and indicate the acreage within each area for which water is claimed on the ground that it is "practicably irrigable." The acreage figures recited are, at this stage, only approximate, albeit we believe them to be substantially correct.

a. *Fort Mojave Reservation*

There are two boundary adjustments affecting this Reservation: (i) the restoration of that portion of the Hay and Wood Reserve west of the Blout survey of 1928; and (ii) the adjudication of a tract formerly claimed by the LaFollettes as properly part of the Reservation. We deal with these in sequence.

(i) *Hay and Wood Reserve.* The so-called Hay and Wood Reserve—once attached to the Camp Mojave Military Reservation and transferred with it in 1890 to the Department of the Interior for the benefit of the Tribe—constitutes the central-western portion of the Fort Mojave Indian Reservation. The western boundary of this tract, the whole of which was de-

scribed as containing some 9,000 acres, was surveyed by Sidney Blout in 1928. The correctness of that survey was long disputed and was challenged by the United States in the original proceedings in this case. As already noted, however, the Court disapproved the Special Master's attempt to resolve the matter and the question remained for administrative determination. Ultimately, on June 3, 1974, the Secretary of the Interior, acting on the advice of the Solicitor, issued an Order annulling the 1928 survey and restoring the old boundary for the Hay and Wood Reserve a little more than a mile westward. A new plat was prepared; it was protested by alleged patentees; these objections were overruled and the final plat was approved and filed on November 6, 1978.

The upshot is that some 3,500 acres, not treated as part of the Fort Mojave Reservation when the water allocations were decreed in 1964, have been confirmed to the Reservation. Within this tract (the whole lying within the State of California) preliminary investigations indicate approximately 2,500 practicably irrigable acres. Applying the now settled formula of 6.46 acre-feet of water per acre, the additional annual mainstream diversion for the use of the Reservation resulting from this boundary adjustment would be 16,150 acre-feet, all of it chargeable against California's allocation.

As we have noted, there are claimants who assert valid patents under the Swamp Lands Act or grants to the Southern Pacific Railroad within this restored area—aggregating about 250 acres. Unless those

claims are amicably settled, it will be appropriate, now as before, to include a proviso specifying that the new allocation must be reduced by 6.46 times the number of acres ultimately determined to be held by Swamp Lands Act and railroad grant patentees.

(ii) *LaFollette tract.* A relatively minor adjustment of the Fort Mojave Reservation boundary has occurred on the western side, south of the Hay and Wood Reserve. Here, in an area where the Reservation is defined by sections laid out in checkerboard fashion, the Tribe obtained a stipulated judgment in its favor against the assignees of a railroad grant, effectively adding most of a section to the Reservation. *Fort Mojave Tribe* v. *LaFollette,* Civ. No. 69-324MR (D. Ariz. Feb. 7, 1977). It is estimated that the tract in question comprises some 500 irrigable acres (all in Arizona), which would entitle the Reservation to an additional annual diversion of 3,230 acre-feet.

b. *Chemehuevi Reservation*

There is a single boundary change in the case of this Reservation. In 1941 certain lands were taken from the Reservation in connection with the construction of Parker Dam, which created a large reservoir known as Havesu Lake, encroaching upon the shoreline of the Reservation. It was ultimately determined, however, that more land than needed had been appropriated and some 2,430 acres along Lake Havesu were restored to the Chemehuevi Reservation by Secretarial Order of August 15, 1974. Although most of this land cannot be irrigated, our preliminary inves-

tigations indicate that the restored area comprises some 150 practicably irrigable acres. This would entitle the Reservation to an additional annual diversion of 895.5 acre-feet, chargeable against California's allocation.

c. *Colorado River Reservation*

There are two boundary adjustments affecting this Reservation, the first in the so-called "Benson line" area, the other along the northwest boundary.

(i) *Benson line.* For many years, a doubt has existed whether the central western boundary was properly viewed as the fluctuating channel of the Colorado River or, rather, the line meandered by W. F. Benson in 1879, now on the California side of the river. In the proceedings before the Special Master, the United States asserted the Benson line as the true boundary, but, once again, the Court disapproved the Master's attempt to decide the question and the matter was left to administrative resolution. After full consideration, on January 17, 1969, the Secretary of the Interior formally adopted the Benson line as the western boundary of the Reservation for the entire segment covered by that survey. The United States subsequently obtained final judgments quieting its title as trustee for the Tribes to separate parcels within the restored area. See, *e.g.*, *United States* v. *Samuel Curtis, et ux.*, No. 72-1624-DWW (C.D. Cal. Jan. 7, 1977); *United States* v. *Brigham Young, et al.*, No. 72-3058-DWW (C.D. Cal. Dec. 12-13, 1976, Apr. 6, 1977); *United States* v. *Robert H. Clark, et al.*, No. 72-1625-RJK (C.D. Cal. Apr. 22, 1977).

The Benson line decision restored some 4,400 acres to the Reservation, of which approximately 3,010 are practicably irrigable. Thus, an additional annual diversion of 20,077 acre-feet is appropriate in respect of this boundary adjustment, the whole charged against California's allocation.

(ii) *Northwest boundary.* The Benson line investigation disclosed another surveying error, affecting the northwest boundary of the Reservation. The survey line, it transpired, had been run to the easternmost, rather than the westernmost, of the peaks constituting Riverside Mountain at the southwest end of the line. A corrected plat was approved on December 18, 1978. The restored "sliver" contains approximately 450 acres, of which some 100 appear to be practicably irrigable. This would entitle the Reservation to an additional annual diversion of 667 acre-feet, again to be charged against California's allocation.

d. *Fort Yuma Reservation*

At the time of the original proceedings before the Special Master and the Court, the Reservation was believed to comprise only those areas allotted to tribal members, for which trust patents were issued in 1914. This represented only a fraction of the original Reservation as established in 1884 and the propriety of treating the Reservation as so diminished has been questioned over the years. After due consideration, the Secretary of the Interior, by Order of December

20, 1978, has now determined that the original boundaries remain effective.

The consequence of this decision for water allocation is very limited, however. We advance no claim for the approximately 7,700 acres in the eastern portion of the Reservation which have been patented to non-Indians (the so-called "Bard" area). Nor do we request any allocation of water in respect of the substantial acreage to the north and west of the All American Canal because it is not, in our view, practicably irrigable. Our claim is confined to unallotted and unpatented lands south of the Canal, primarily accretions along the river. Within this restored area, there appear to be approximately 5,500 irrigable acres, some 4,200 in California, the balance in Arizona. Accordingly, the Reservation would be entitled to additional annual diversions of 36,685 acre-feet (28,017 chargeable against California's allocation, 8,668 against Arizona's).

e. *Cocopah Reservation*

Here, also, there are two boundary adjustments, both to the Western Reservation: (i) an area of accretion to the west of the old boundary; and (ii) an added tract just to the south of the accreted lands.

(i) *Accreted lands.* Because of the gradual western movement of the Colorado River at this point, substantial lands accreted to the Reservation on its western side. This was confirmed by a final judgment entered May 12, 1975. *Cocopah Tribe* v. *Morton*, No. CIV-70-573-PHX-WEC (D. Ariz.). The total

acreage added amounts to 883.53, of which 780 acres has been preliminarily determined to be practicably irrigable. The Reservation is, on this account, entitled to additional annual diversions of 4,969 acre-feet.

(ii) *Added lands.* By Act of June 24, 1974 (88 Stat. 266) Congress effectively extended the boundaries of the West Cocopah Reservation by adding a strip immediately below the accretions. This comprises 357.46 acres, of which approximately 332 are practicably irrigable. This justifies a further annual diversion of 2,115 acre-feet. Both additional diversions should be charged against Arizona's allocation.

C. OMITTED LANDS

The second aspect of our motion is a request for additional mainstream diversion rights for lands which were conceded to be within the several Reservations at the time of the original proceedings, but which were not asserted to be "practicably irrigable" and accordingly were omitted from consideration in calculating the allocation of water for the several Reservations. Here, also, procedural objections are interposed and we address these before turning to the detailed claims.

1. NATURE AND VIABILITY OF THE CLAIMS

In responding to the tribal motions for leave to intervene, the State parties have indicated their view that any plea for additional water in respect of "omitted lands" is foreclosed by the Decree entered

in 1964. *E.g.*, Response filed by all State parties dated January 25, 1978, at 24-25. We disagree. In our submission, neither the doctrine of res judicata nor any other principle bars consideration of these claims, and the balance of equities favors entertaining them.

Res judicata is relied upon. But that doctrine "operates only to bar 'repetitious suits involving the same cause of action.'" *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 578 (1974), quoting *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948). Accordingly, res judicata can have no application to the present motion, filed in the original case. Nor can it be objected that we have improperly sought to avoid res judicata by moving in the old suit. The Court's decree expressly authorizes that procedure in Article IX, which we invoke (376 U.S. at 353):

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

Indeed, the unqualified language of Article IX removes any jurisdictional or other technical obstacle to our motion. The only question is whether, in all the circumstances, the Court deems it appropriate to exercise its undoubted authority to entertain the omitted lands claims. We suggest the balance of considerations argues in favor of so doing.

It is, of course, desirable in every case that exact justice be done. And, to that end, all courts are empowered, within limits, to correct their judgments. See Rule 60(b), Fed. R. Civ. P. On the other hand, countervailing considerations counsel a halt to indefinite reconsideration of matters already decided. Thus, here, although the Reservations are entitled to more water than was adjudicated, the omission might be beyond remedy if to repair it placed an undue burden on the Court or unfairly prejudiced other parties who justifiably relied on the allocations of the original decree. But no such obstacles are present here.

a. First, the task is relatively simple, and it involves no re-examination of anything actually decided, nor any re-weighing of evidence. As we have said, our motion fully accepts the ground rules announced by the Court's opinion of 1963. The only issue is whether certain areas, not before considered, are in fact "practicably irrigable" and accordingly entitled to mainstream water. Because, in the original proceedings, the United States submitted no evidence as to these areas—simply omitting them from the claim—neither the Special Master nor the Court had occasion to determine whether or not they qualified as irrigable. We urge no re-examination, no reconsideration, no rehearing, of an earlier finding. Strictly speaking, we seek leave to advance additional claims, premised on new evidence, bearing on lands never yet put in issue.

There is thus no wasteful relitigation. Nor are the further proceedings we evisage unduly burden-

some. At all events, a hearing is necessary to determine the irrigability of the "boundary lands." We merely suggest that the occasion also be utilized to consider the "omitted lands," applying the same standards. That will add little to the task of the Court and of the parties.

b. Nor can the State parties rightly cry "foul," on the ground that the claims now advanced seek to unsettle a decree understood to be carved in stone. Article IX, quoted above, gave full warning that any party might later seek modification of the judgment. And that is familiar practice in cases of this kind. See, *e.g.*, *New Jersey* v. *New York*, 347 U.S. 995 (1954), modifying 283 U.S. 805 (1931); *Wisconsin* v. *Illinois*, 388 U.S. 426 (1967), modifying 281 U.S. 696 (1930), and pending Petition for Modification of decree. See also, 6 R. Clark, *Water and Water Rights* 552 (1972).

What is more, although the inclusion of such a provision is customary in decrees entered by this Court in original cases, Article IX was not here treated merely as a traditional appendage. At least some of the State parties now pleading res judicata were, in 1964, most insistent on unqualified language permitting reopening of the decree. Thus, the Imperial Irrigation District of California discussed the relative virtues of particularly specifying the matters left open, as compared to framing a general provision like Article IX, in order to avoid "the possible claim that this Court may not alter or modify its rulings herein on the basis that the Decree is res

adjudicata of the issues sought to be considered or reconsidered." It was argued that the Court "should not desire to find itself embarrassed by a provision in the Decree or ruling if the United States or parties can later convince this Court that this Court's determination has been erroneous or unworkable." Supplement and Amendment to Imperial Irrigation District's Form of "Decree of Court," etc., filed December 1963, at 11. In the end, the District urged both courses. See Decree of Court as Submitted by Imperial Irrigation District, filed November 1963, at 60-62. And the other parties obviously shared this view, all joining in recommending inclusion of Article IX, despite the specific caveats of Article VIII. See Agreed Provisions for Proposed Final Decree, *supra*, at 18.

We do not suggest that Article IX was intended to create a fully open-ended decree. On the contrary, as we discuss in a moment, that solution was considered and rejected by the Special Master. But it does appear everyone understood that, for a time at least, "mistakes" in the original decree could, when discovered, be corrected by amendment. That is all we seek to do here. It can hardly come as a total surprise that, 20 years later, closer study has disclosed that we committed errors in failing to appreciate the irrigable character of certain acreage. Although we deny any deliberate failure faithfully to advocate the rights of the Tribe—whether on account of a conflict of interest or any other reason—the complexity of the issues before the Special Mas-

ter contributed to inadvertent omissions, as well as erroneous judgments, in identifying irrigable acreage within the several Reservations. In some instances, a more careful investigation has revealed our oversight. In others, actual experience in irrigating excluded acreage has demonstrated our mistake. This was always likely, if not inevitable. We submit such omissions were meant to be reparable, at least until such time as the parties would be taking substantial action in reliance on the allocations specified in the decree.

c. We come then to the critical inquiry: whether permitting additional diversions in respect of "omitted lands" would unfairly prejudice parties who justifiably relied to their detriment on the original allocations. One might suppose this would be the case after the lapse of 14 years. But, as it happens, there is no such impediment.

The relevance of the question we now consider is highlighted by the Special Master's approach. He fully accepted the principle that, in establishing the several Reservations, the United States reserved a sufficient amount of water to satisfy their "future as well as the[ir] present needs." 373 U.S. at 600. See *Winters* v. *United States*, 207 U.S. 564 (1908); *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976). And he recognized that accurately predicting the amount necessary to satisfy these needs indefinitely was a difficult, if not impossible, task. Nevertheless, the Special Master ultimately rejected our submission that there should be an open-ended decree, per-

mitting the tribes to receive additional mainstream diversions as their requirements increased.[10] He was concerned that "such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable," since the "expanding needs on an Indian Reservation might result in a reduction of the project's water supply." Report at 264. Moreover, an open-ended decree "would not give the United States any certainty as to the extent of its reserved rights, which would undoubtedly hamper the United States in developing them." *Ibid.* On both sides, he believed, planning and financing would be embarrassed if the allocations were left subject to unrestricted modification. And so, the Master suggested a ceiling on the tribal water rights, which this Court approved as "reasonable." 373 U.S. at 600.

But the rationale of this solution does not inhibit relatively minor adjustments before *all* rights have been quantified. Only when the amount and priority date of all present perfected rights—not simply those the United States holds in trust—are determined, is any claimant secure in his expectations. Until then, the holders of non-Indian perfected rights remain "in jeopardy of the uncertain and the unknowable," since none knows his own allocation, much less the sum of the rights senior to his. And even the United States is unsure what rights may be senior to those it holds in trust for the tribes.

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[10] See, *e.g.*, *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956); *Conrad Investment Co.* v. *United States*, 161 F. 829 (9th Cir. 1908).

These uncertainties have prevented any party from acting in reliance on the 1964 Decree. To be sure, the original expectation was that all rights would be finally quantified within two years, or little more. But, in fact, the non-Indian perfected rights were not agreed or otherwise adjudicated—and will not be—until the entry of the Supplemental Decree now pending before the Court. The upshot is that no one has been in a position to rely on any prior allocation. Since no estoppel prevents it and no unfairness can result, past errors ought now be corrected.

2. PARTICULARS OF THE CLAIMS

We detail the claims for "omitted lands" in the same order as before. Again, however, we stress that the figures given for "practicably irrigable" acreage are only approximate.

a. *Fort Mojave Reservation*

Practicably irrigable land overlooked in the case of this Reservation lies in three main areas: (i) approximately 150 acres on the western side of the "Camp Mohave Reserve" in Nevada; (ii) approximately 100 "omitted" acres on the California bank of the Colorado River in the "Hay and Wood Reserve," the river having been channelized in this reach after the evidence was prepared for the Special Master proceedings; and (iii) approximately 1,000 acres in the vicinity of the original Fort Mojave site in Arizona. This results in an additional annual entitlement of 8,075 acre-feet, of which 969 acre-feet would be chargeable to Nevada, 646 to California, and 6,460 to Arizona.

b. *Chemehuevi Reservation*

Further investigation has disclosed some 500 irrigable acres omitted from consideration in the original proceedings. These lie in California and would entitle the Reservation to some 2,985 acre-feet of additional diversions annually, chargeable against that State's allocation.

c. *Colorado River Reservation*

The most substantial omissions occurred in the case of this Reservation, which is by far the largest of the five. Three separate areas of "omitted lands" are involved: (i) some 9,000 acres on the east bank of the Colorado, between the river and the levee (all in Arizona); (ii) some 2,000 acres in the northwest part of the Reservation, across the river in California; and (iii) some 4,000 acres on the east side of the planned gravity irrigation system, but below the mesa (all in Arizona). Recognition of these lands as "practicably irrigable" would entitle the Reservation, in the aggregate, to 100,050 acre-feet of additional diversions annually, 13,340 acre-feet to be charged to California and 86,710 acre-feet to Arizona.

d. *Fort Yuma Reservation*

Closer study has revealed that some 500 irrigable acres within the diminished boundaries of the Reservation as it was conceived in 1964 were then erroneously omitted from consideration. Accordingly, 3,335 additional acre-feet of diversions should be permitted annually, to be charged against California's allocation.

e. *Cocopah Reservation*

In the East Cocopah Reservation approximately 33 acres of practicably irrigable land were omitted from consideration. They would add 210 acre-feet of annual mainstream diversions, chargeable against Arizona's allocation.

D. RECAPITULATION

On the basis of the estimates recited in the preceding paragraphs, the total claim on behalf of the five Reservations is for 199,443 acre-feet of water in respect of 30,155 acres. This is, in the aggregate, an increase over present entitlement of about 20%. Something less than half of the increment (84,788 acre-feet) reflects boundary adjustments; the remainder, "omitted" lands.

The charge against each of the States would be as follows:

Arizona	112,362 acre-feet
California	86,112 acre-feet
Nevada	969 acre-feet

By Reservation, the breakdown is the following:

	Land (acres)	Water (acre-feet)
FT. MOJAVE		
Boundary lands	3,000	19,380
Omitted lands	1,250	8,075
Total	4,250	27,455
CHEMEHUEVI		
Boundary lands	150	895
Omitted lands	500	2,985
Total	650	3,880

	Land (acres)	Water (acre-feet)
COLORADO RIVER		
Boundary lands	3,110	20,744
Omitted lands	15,000	100,050
Total	18,110	120,794
FT. YUMA		
Boundary lands	5,500	36,685
Omitted lands	500	3,335
Total	6,000	40,020
COCOPAH		
Boundary lands	1,112	7,084
Omitted lands	33	210
Total	1,145	7,294

E. CONCLUSION

The present motion, it seems plain, must be referred to a Special Master. But we urge the Court not to leave the matter entirely at large in making such a reference. To do so would, we believe, both invite unnecessarily protracted hearings and diminish any prospect of an amicable settlement.

Specifically, we suggest the Court ought now lay down the following governing principles:

(1) That the claims advanced in respect of "boundary lands" are now ripe for adjudication, and that this Court (and therefore its Master) will not undertake to review in these proceedings the correctness of the boundary adjustments which have been settled or accepted by the Secretary of the Interior, nor to decide any title disputes affecting particular parcels within a Reservation;

(2) That the entitlement of any Reservation to additional mainstream diversions on account of boundary adjustments is determined in accordance with the standard and the formulae utilized by the Court in its original decision;

(3) That, accordingly, the only task of the Special Master in relation to the claims made for "boundary lands" is to make findings as to the "practicably irrigable" acreage comprised within the restored areas and to recommend additional mainstream diversions by applying the acre-feet per acre ratios already established for each Reservation;

(4) That the claims in respect of "omitted lands" are not foreclosed and must be determined on their merits;

(5) That additional diversions on account of areas not before considered should be determined in accordance with the standard and the formulae previously established;

(6) That, accordingly, the only task of the Special Master in relation to the claims made for "omitted lands" is to make findings as to the "practicably irrigable" acreage comprised within the areas omitted from consideration during the original proceedings and to recommend additional mainstream diversions

by applying the acre-feet per acre ratios already established for each Reservation.

Respectfully submitted.

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IN THE

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October Term, 1978

No. 8, Original

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Response of the States of Arizona, California, and Nevada and the Other California Defendants to the Motion of the United States for Modification of Decree.

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SUBJECT INDEX

I

Page

Introduction 2

II

The Issue of Practicably Irrigable Acreage Within the 1964 Reservation Boundaries Should Not Be Relitigated 4

A. Article IX of the Court's Decree Does Not Authorize Relitigation of Practicably Irrigable Acreage Within the 1964 Boundaries; That Issue Was Fully Tried by the Special Master and Finally Determined by the Court 4

B. Public Policy Considerations Behind the Doctrines of Res Judicata and Collateral Estoppel Should Preclude Relitigation of Practicably Irrigable Acreage; Judicial Orderliness, Economy of Judicial Time, and Interests of the Litigants Should Be Preserved 7

III

None of the Boundary Disputes Underlying Claims to Additional Water Rights Have Been Finally Determined 11

A. The Relevance of Indian Reservation Boundaries in This Litigation 11

B. Orders of the Secretary of the Interior Are Not Final Determinations of Reservation Boundaries for Purposes of Establishing Water Rights 12

Page

C. The Federal Court Cases Are Not Final Determinations of Reservation Boundaries for Purposes of Establishing Water Rights 18

IV

The Reservation Boundary Disputes Are Ripe for Judicial Determination for the Limited Purpose of Resolving Water Rights Claims 20

V

This Court, Through Its Special Master, Should Determine All Boundary Disputes for the Limited Purpose of Resolving Water Rights Claims 22

Conclusion 25

Exhibit A. Letter to Robert P. Will, General Counsel, Dated January 3, 1979.

TABLE OF AUTHORITIES CITED

Cases	Page
Abbot Laboratories v. Gardner, 387 U.S. 136	13
Allegheny Corp. v. Breswick & Co., 353 U.S. 151	21
Anselmo v. Harden, 253 F.2d 165	7, 8
Arizona v. California	8
Arizona v. California, 373 U.S. 546	6, 15, 16, 22, 25
Arizona v. California, 376 U.S. 341	6, 15, 22
Barney v. Keokuk, 94 U.S. 324	20
Bernhard v. Bank of America, 19 Cal.2d 807	19
Bruszewski v. United States, 181 F.2d 419	19
Central Council of Tlingit & Haida Indians, Etc. v. Chugach Native Assn., 502 F.2d 1323	16, 17
Citizens Ass'n of Georgetown, Inc. v. Zoning Com'n of D.C., 477 F.2d 402	13
City of Chicago v. United States, 396 U.S. 162	13
[illegible]pah Tribe of Indians v. Rogers, 70-573-PHX-WEC	19
Conway v. Mosher, 55 Ariz. 307, 101 Pac. 209	20
Costello v. United States, 365 U.S. 265	16
Cromwell v. County of Sac, 94 U.S. 351	8
Dillard v. McKnight, 34 Cal.2d 209	18, 19
Erie R. Co. v. Tompkins, 304 U.S. 64	20
Felice v. U.S., 271 F.2d 782	7
Fogarty v. Sparks, 22 Cal. 142	20
Frozen Food Express v. United States, 351 U.S. 40	21

Page

Graves v. Associated Transport, Inc., 344 F.2d 894 19

Hale v. Finch, 104 U.S. 261 19

Halstead v. Grinnan, 152 U.S. 412 17

Hurt v. Jones, 147 Cal.App.2d 164 20

Keokuk & Western Railroad v. Missouri, 152 U.S. 301 21

Lake Merced Golf & Country Club v. Ocean Shore R.R. Co., 206 Cal.App.2d 421 20

McIntosh v. Wiggins, 123 F.2d 316 8

Miller v. National City Bank of N.Y., 166 F.2d 723 7

O'Hara v. Pittston Co., 42 S.E.2d 269 19

Painters District Council Etc. v. Edgewood Contracting Co., 416 F.2d 1081 14

Pan American Petroleum Corp. v. Pierson, 284 F. 2d 649 15

Southern Pacific R. Co. v. U.S., 168 U.S. 1 8

State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 20

Stovall v. Banks, 77 U.S. 583 7

Sutphen Estates v. United States, 342 U.S. 19 18

Sutphin v. Speik, 15 Cal.2d 195 8

United States v. Brigham Young University, 72-3058-DWW 19

United States v. Curtis, 72-1624-DWW 19

United States v. Denham, 73-495-ALS 19

United States v. Kabinto, 456 F.2d 1087 8

Page

United States v. Utah Constr. Co., 384 U.S. 394 14

Wattson v. Dowling, 26 Cal. 124 20

Winters v. United States, 207 U.S. 564 .....11, 19

Statutes

Colorado River Basin Project Act, 43 United States Code § 1501 22

5 United States Code § 702 13

Texts

Moore's Federal Practice, § 702 13

Moore's Federal Practice, § 0.302(4), pp. 3015-3016 20

Wilbur and Ely, The Hoover Dam Documents (1948), App. 1003 21

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OF NEVADA, Intervenor (hereinafter referred to collectively as the "State Parties") hereby respond to the Motion of the United States for Modification of Decree, dated December 1978.

I
Introduction.

The United States brings this motion under Articles II(D)(5) and IX of the Court's 1964 Decree, and does so on behalf of five Indian tribes, the Chemehuevi, the Colorado River, the Cocopah, the Fort Mojave, and the Quechan Tribe of the Fort Yuma Indian Reservation (hereinafter referred to collectively as "the Five Tribes"). The United States seeks to modify Article II of the Decree so as to increase the quantity of water rights allocated to each of the Five Tribes. There are two alleged bases for these increases: (1) additional water rights based on recalculation and increase in the number of irrigable acres within the boundaries of each Indian reservation as they were recognized in the 1964 Decree (so-called "Omitted Lands"); and (2) additional water rights based on post-Decree determinations that each reservation contains more area, and hence more irrigable acreage, than was recognized in the 1964 Decree (so-called "Boundary Lands"). With regard to (2), the United States claims that determinations recognizing enlarged reservation boundaries consist of Orders of the Secretary of the Interior, court judgments, and Acts of Congress,[1] all of which it claims are now final and not subject to judicial review. The United States contends, therefore, that all this Court (or an appointed Special

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[1]The United States mentions Acts of Congress (p. 1) but never specifies what they are.

Master) need do is to calculate the number of practicably irrigable acres within those established boundaries and assign additional water rights based thereon.

The State Parties disagree. As to the alleged "omitted lands," the issue of the number of practicably irrigable acres within the 1964 boundaries was fully litigated before the previous Master and finally determined by this Court in 1964, and Article IX does not authorize its reopening. As to the "boundary lands," neither the referenced Secretarial Orders nor the court judgments constitute final determinations of boundaries for purposes of establishing water rights. The State Parties do agree, however, that the underlying boundary disputes are ripe for judicial determination, that such determinations should be made by this Court, through its appointed Special Master, and that such determination can be made for the limited purpose of establishing water rights without constituting adjudications of land titles or political jurisdiction binding on any party or non-party to this lawsuit.

The State Parties contend, therefore, that this Court, through the Special Master, should only consider the boundary land claims. Such consideration should involve a two-step process: (1) determination of the underlying boundary disputes to see if any reservation has larger boundaries than were recognized in 1964; (2) if such is the case, establishment of water rights based on practicably irrigable acreage within those enlarged boundaries.

II

The Issue of Practicably Irrigable Acreage Within the 1964 Reservation Boundaries Should Not Be Relitigated.

A. Article IX of the Court's Decree Does Not Authorize Relitigation of Practicably Irrigable Acreage Within the 1964 Boundaries; That Issue Was Fully Tried by the Special Master and Finally Determined by the Court.

The issue of the amount of practicably irrigable acres within the boundaries recognized in the 1964 Decree of all five Indian reservations was fully tried by the Special Master. Substantial evidence, including expert testimony, maps, and soil surveys, was presented by the parties during the lengthy proceedings on the issue of practicably irrigable acreage within the undisputed reservation boundaries. At the time the original decision was made by the Department of Justice lawyers and their experts as to the practicably irrigable acreage, there was ample data on soils, the location of then-existing irrigation facilities, and the economic feasibility of extending those facilities. The United States' present contention that reservation lands were "omitted" from practicably irrigable acreage consideration is untenable. All the lands within the 1964 boundaries were fully considered and taken into account by the United States attorneys and their experts, and the non-practicably irrigable lands were consciously excluded from any water allocation claim because it was determined that they were not practicably irrigable; and the parties, Special Master, and the Court were all so advised in the course of the trial proceedings.[2] Thus, the lands

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[2]On January 7, 1958, the following interchange took place between David Warner (attorney heading Department of Justice legal team during the trial) and Special Master, Simon Rifkind:

in question are more properly referred to as "lands deemed non-irrigable."

The Special Master advocated a finite decree, as opposed to an open-ended decree, that would establish a water right for each of the five reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the reservation and to satisfy related stock and domestic uses. (Special Master's Report 1960, at 263-265.) A finite determination of reservation water rights was considered necessary by the Special Master so that in time of shortage the Secretary of the Interior would know how much water to release to satisfy his delivery obligations according to priority. (Special Master's Report 1960, at 255-256.) The Special Master emphasized his concern:

> "This will preserve the full extent of the water rights created by the United States and will establish water rights of *fixed magnitude* and priority *so as to provide certainty* for both the United States and non-Indian users." (Emphasis added.) (Special Master's Report 1960, at 265.)

THE MASTER: ". . . The question is whether the maps constitute the definition of what you regard as irrigable . . ."

MR. WARNER: "Well, Your Honor, that is how we are defining 'irrigable' for the purpose of proving the claim that is being asserted."

THE MASTER: "And although there may be other irrigable lands within those reservations, those you do not lay any claim for the service of water upon?"

MR. WARNER: "That is correct."

THE MASTER: "All right. That is what we know, and that is the way we are going to be bound. This is a statement that I will take seriously." (See, Transcript before Simon H. Rifkind, Special Master, p. 14,155.)

In his same report, the Special Master recommended adoption of a Decree containing the identical Article IX which the United States now relies upon in arguing that recalculation of practicably irrigable acreage is permitted and that water rights have not been fully determined for the 1964 boundaries. (Special Master's Report 1960, at 360.) Surely the Special Master did not attach such a meaning to Article IX, nor did the Court. Referring to claims of the United States, the Court stated:

> "While the Master passed upon some of these claims, he declined to reach others, particularly those relating to tributaries. We approve his decision as to which claims required adjudication, and likewise *we approve the decree he recommended for the government claims he did decide.*" (Emphasis added.) (Opinion of the Court, 373 U.S. 546, 595.)

The Court also adopted the same Article IX, proposed by the Special Master. (Decree of the Court, 376 U.S. 341, 353.)

The State Parties contend that this Court intended Article IX to reserve jurisdiction only over matters not finally determined and that it did, in Article II of the Decree, finally adjudicate irrigable acreage within the 1964 boundaries, as recommended by the Special Master. Such adjudication is not subject to the Court's continuing jurisdiction under Article IX.

B. Public Policy Considerations Behind the Doctrines of Res Judicata and Collateral Estoppel Should Preclude Relitigation of Practicably Irrigable Acreage; Judicial Orderliness, Economy of Judicial Time, and Interests of the Litigants Should Be Preserved.

The United States' attempt to relitigate practicably irrigable acreage within the 1964 boundaries, and within the original lawsuit under Article IX, is a procedural ploy designed to avoid the doctrines of *res judicata* and collateral estoppel. These doctrines would clearly bar any such attempt made in a separate lawsuit. They should also apply here under the rule that a judgment may be final even though a party is given leave to apply to the trial court for its modification. (*Stovall v. Banks* (1870) 77 U.S. 583.)

Whether or not *res judicata* or collateral estoppel technically apply to this matter, it is clear that to permit relitigation of practicably irrigable acreage would defeat the public policy considerations behind the two doctrines. *Res judicata* provides that a final, valid judgment on the merits is conclusive on the parties and those in privity with them as to the matters adjudged, or which should have been litigated, in another action or proceeding involving the same cause of action. (See, *Felice v. U.S.* (9th Cir. 1959) 271 F.2d 782; *Miller v. National City Bank of N.Y.* (2nd Cir. 1948) 166 F.2d 723.) Such a judgment is the final judicial settlement regardless of whether all the grounds of recovery available have been put forward and even though the parties may have lacked knowledge of their complete legal rights therein. (See, *Anselmo v. Harden*

(3rd Cir. 1958) 253 F.2d 165; *McIntosh v. Wiggins* (8th Cir. 1941) 123 F.2d 316, *cert. den.* 315 U.S. 831 (1942).) The judgment is conclusive not only as to matters actually determined in the prior action, but also as to other matters which could properly have been raised and determined. It is not essential that the matter should have been formally put in issue in the former litigation; it is sufficient that the status of the action was such that the parties might have had the matter disposed of on its merits. (See, *Cromwell v. County of Sac* (1876) 94 U.S. 351; for a case pertaining to Indian claims, see *United States v. Kabinto* (9th Cir. 1972) 456 F.2d 1087, *cert. den.* (1972) 409 U.S. 842.)

The rule of collateral estoppel provides that where two actions are on different causes of action, the earlier judgment is conclusive not only as to issues actually determined in the prior action but also as to other matters which were necessary to the decision. (See *Southern Pacific R. Co. v. U.S.* (1897) 168 U.S. 1; *Sutphin v. Speik* (1940) 15 Cal.2d 195.)

The United States request that the Court recalculate practicably irrigable acreage ignores the doctrines of *res judicata* and collateral estoppel, thereby resulting in wasted effort and expense in judicial administration. If the United States' position prevails, permitting a recalculation, then the other parties to *Arizona v. California* would logically and equitably be afforded the reciprocal right to relitigate all the reservation irrigable acreage issues originally presented before the Special Master, including the question of whether "practicably irrigable acreage" should be determined as of the date each reservation was created rather than at the time of

trial. Undoubtedly, the strategy of the parties in presenting their positions before the Special Master was based, in part, on the claims then being asserted by the United States. To permit the United States at this late date to augment its claims within the conceded boundaries without permitting the parties the right to relitigate the findings on irrigable acreage would be a great inequity. The resulting wasted effort and expense in judicial administration entailed in such relitigation is one of the abuses sought to be remedied by the doctrines of *res judicata* and collateral estoppel.

In addition, any relitigation of irrigable acreage would adversely and unreasonably affect the interests of the State Parties. Taking one such example, relitigation may violate the interest of the Metropolitan Water District in the stability of definite water rights resulting from a final decree and the right not to be subjected to endless costly litigation and the continuous potential of having its water allocation reduced.

Another vivid example exists in Arizona where construction of the Central Arizona Project (CAP) is currently progressing. Plans for the CAP included water supply calculations of water available for delivery through the project. The Central Arizona Water Conservation District, created by the Arizona Legislature to contract with the Secretary of the Interior, entered into a contract with the Secretary and imposed taxes on property owners within three counties in Arizona to ensure repayment to the United States. The Arizona Water Commission has delivered to the Secretary of the Interior its recommendations for the allocations of municipal and industrial water to users requesting such water and is now considering staff recommendations for allocations of agricultural water.

All of the construction expenses, taxes, and allocations of water have been based on the expected supply which was determined by reliance on this Court's Opinion and 1964 Decree, including entitlements therein made to the Five Tribes which the United States now seeks to relitigate. The Arizona Water Commission recommended to the Secretary of the Interior that 500,000 acre-feet be allocated to municipal and industrial users. If the Tribes obtain another 93,380 acre-feet of water rights (as claimed under recalculation in Arizona), this will reduce that allocation by approximately one-fifth. It will also decrease the supply allocated to five *other* Indian tribes in Central Arizona to be delivered through the CAP.

The Special Master specifically adopted the practicably irrigable acreage test to provide certainty and stability for the State Parties and others which serve approximately 12 million people and hundreds of thousands of acres of prime farm land. The United States' characterization of the recalculation of irrigable acreage as "relatively minor adjustments" (U.S. Motion, p. 29) does not accurately indicate the potential impact of such changes on the State Parties. In the event the Court grants the requested modification and permits 114,655 acre-feet of additional diversions annually chargeable against Arizona, California, and Nevada, the increased Indian allocation to Colorado River water could reduce the allocation of those State Parties which have contracts with the United States for delivery of Colorado River water.

In conclusion, irrigable acreage within the 1964 boundaries should not be relitigated for two reasons: (1) Article IX does not authorize it; and (2) public policy considerations preclude it.

III

None of the Boundary Disputes Underlying Claims to Additional Water Rights Have Been Finally Determined.

A. The Relevance of Indian Reservation Boundaries in This Litigation.

The United States originally intervened in this action in part as trustee to assert water rights claims on behalf of all Indian reservations in the Lower Colorado River Basin. In its pleadings and at trial it asserted a "reserved" water right for each of those reservations under the *Winters* doctrine (*Winters v. United States* (1908) 207 U.S. 564) which it argued should be measured by the amount of "practicably irrigable acreage" within the boundaries of each reservation. In order to prevail, the United States, just like all the other parties, bore the burden of establishing the factual basis for the Indian claims. Consequently, it had to show that the lands for which it claimed water rights were within each reservation's legally established boundaries, much as a claimant to a riparian water right must establish that he is the owner of riparian land. When the United States presented the maps purporting to show the boundaries of each reservation, the State Parties checked those maps against the legal descriptions in the statutes and executive orders which created the reservations. Where there was no inconsistency, which was the rule, no objection was made, and the Special Master and the Court accepted the accuracy of those boundaries for the limited purpose of establishing water rights for the five reservations. Those water allocations implicitly determined the proper boundaries of the reservations for purposes of the interstate water rights controversy, but obviously such

boundary determinations were not to be binding on other land claimants not parties to the action.

Where discrepancies in the proposed boundaries were detected, as on the Fort Mojave and Colorado River reservations, California objected that no water could be allocated to the lands in the disputed areas. The Special Master felt it appropriate to resolve the disputes that were before him, primarily in order to provide the certainty for future water planning that led him to select "practicably irrigable acreage" as the measure of the Indian water rights in the first place. The Court declined to follow the Special Master's approach, as we discuss *infra*. Those two boundary disputes, plus two others, are now before the Court.

B. Orders of the Secretary of the Interior Are Not Final Determinations of Reservation Boundaries for Purposes of Establishing Water Rights.

The Secretarial Orders relied upon by the United States are functional for Department of Interior administrative purposes only, but cannot be considered final for the purpose of establishing claims for federally reserved water rights which are adverse to the interests of most, if not all, of the State Parties. The *finality* of the Secretarial Orders indicates *not* that they are immune from judicial review, but that they have reached the stage of completeness that is necessary before they can be subjected to judicial review.[3] A person suffering

[3]The Department of Interior, Office of the Solicitor, in a letter dated January 3, 1979, informed the Metropolitan Water District of Southern California that the Department of the Interior considers the Secretarial Orders to be final for its purposes. The letter states that there are no administrative procedures available to challenge Secretarial Orders and that review of such matters must take place in a judicial forum. A copy of said letter is attached, marked Exhibit A, and made a part hereof.

legal wrong because of agency action is entitled to judicial review, unless such review has been forbidden in unmistakable terms. (See, 5 U.S.C. §702; *Chicago v. United States* (1969) 396 U.S. 162; *Abbot Laboratories v. Gardner* (1967) 387 U.S. 136; *Citizens Ass'n of Georgetown, Inc. v. Zoning Com'n of D.C.* (1973) 477 F.2d 402.)

Attributing a conclusive status to the Secretarial Orders thereby rendering them immune from judicial review will deprive the State Parties of any opportunity to have their positions considered. The State Parties were not afforded the opportunity to participate in the administrative process leading to the issuance of the Secretarial Orders. This is especially inequitable since several of the boundary claims were presented before and rejected by the Special Master assigned in 1955 for the original litigation. The United States has *ex parte* enlarged the reservation boundaries of the Fort Mojave and Colorado River Reservations by Secretarial Orders on grounds the Special Master rejected. Thus, the United States has tried to achieve by Secretarial Order that which it was unable to accomplish at trial before the Special Master. The reasoning behind the United States' attempt to limit the Court's discretion to now question these Secretarial Orders is apparent; examination of the Orders in an adversary proceeding could reveal their invalidity.

The unilateral action taken by the Secretary of the Interior is almost shocking in the case of the December 20, 1978 Secretarial Order relating to the Fort Yuma Reservation. In this case, three previous Interior Solicitor opinions over a forty-one year period (Margold-1936, Weinberg-1968, Austin-1977) had found invalid the Indian claim to enlarged reservation boundaries.

The last of the three was issued only after the State Parties had urgently requested and been afforded opportunity to argue the matter before the Solicitor. Solicitor Krulitz has now summarily reversed Solicitor Austin's opinion, found the Indian claim to be valid, and the Secretary of the Interior has made an Order to that effect. The Krulitz opinion was issued without any notice or opportunity to be heard afforded to the State Parties; and the Secretarial Order was issued the same day as the opinion, followed the next day by the filing of the United States' Motion. One wonders how any Secretarial Order could ever be considered "final," even for administrative purposes within the Department, when the underlying Solicitor Opinions vary in conclusion from one occupant at that office to the next. The ultimate absurdity is the apparent contention by the United States that somehow the December 20 Secretarial Order became final, and immune from judicial review, the minute it was issued.

The State Parties recognize that administrative decisions can have a *res judicata* effect. This Court has held that *res judicata* applies when the administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which interested parties have had an adequate opportunity to litigate, both before the agency and in court. (*United States v. Utah Constr. Co.* (1966) 384 U.S. 394, 421-422; *Painters District Council, etc. v. Edgewood Contracting Co.* (5th Cir. 1969) 416 F.2d 1081, 1083-1084.) However, the fundamental assumption is that there has been a judicial process before the agency, the very thing totally lacking with the Secretarial Orders relied upon by the United States. It is obvious, therefore, why the United States has not even mentioned

res judicata as a basis for its claim of finality. Instead, the United States seems to be making a two-part argument: (1) the Secretary of the Interior has authority to resolve the reservation boundary disputes; and (2) the failure of the State Parties to challenge the Secretarial Orders has rendered them final. The State Parties emphatically disagree.

First, the Secretary of the Interior has no powers except those granted or necessarily implied from granted powers. (*Pan American Petroleum Corp. v. Pierson* (10th Cir. 1960) 284 F.2d 649, *cert. den.* (1961) 366 U.S. 936.) The United States points to no express authority, but argues that if the Secretary can survey Indian reservation boundaries, he can also resolve these disputes. However, a land survey is far different from resolving a complex boundary dispute involving questions of law as well as fact. Authority to do the latter is not implicit in the authority to do the former.

The United States contends, however, that this Court conferred such authority on the Secretary in its Opinion and Decree. However, all Article II(D)(5) of the Decree provides is that the quantities of water rights allocated to two of the Tribes shall be subject to adjustment "in the event that the boundaries of the respective reservations are finally determined . . ." The Decree says nothing about how, or by whom, the boundaries can be determined. (Decree of the Court, 376 U.S. 341, 345.)

On this matter, the Court's opinion provides:

> "We hold it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled

at that time." (Opinion of the Court, 373 U.S. 546, 601.)

This is hardly language giving the Secretary power to resolve boundary disputes. That power is in this Court and remains there. The Court only meant that it was unnecessary for it to resolve the disputes at that time, not that it was the wrong court or that this was the wrong lawsuit. At best, the language only gives the Secretary power to impliedly resolve disputes in favor of the Indians by delivering water for the disputed lands. He has no power to resolve disputes against the Indians. If he refuses to deliver them water, then "the dispute can be settled"; but there is nothing even purporting to give the Secretary power to settle such disputes. Judicial authority implies the weighing of evidence and arguments and the power to decide in favor of whichever side is more convincing. The Secretary's unilateral authority is not "judicial", and to bind the State Parties to his determination would be grossly unfair.

The second part of the United States' argument is that the State Parties' failure heretofore to challenge the Secretarial Orders has rendered them final. This contention is academic if the Secretary lacked judicial authority to determine the boundary disputes. In any event, however, the argument lacks merit.

Since there is no applicable statute of limitations, the United States is really arguing laches. Laches has two necessary elements, requiring proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. (*Costello v. United States* (1960) 365 U.S. 265, 282; *Central Council of Tlingit & Haida*

Indians, Etc. v. Chugach Native Assn. (9th Cir. 1974) 502 F.2d 1323, 1325.) The United States has not alleged that it or the Five Tribes have been prejudiced by prior failure of the State Parties to challenge the Secretarial Orders. More importantly, however, any claim of lack of diligence by the State Parties must fail.

Laches is an equitable defense controlled by equitable considerations, one of which is that the party against which it is asserted must have had knowledge of its rights and failed to exercise them. (*Halstead v. Grinnan* (1893) 152 U.S. 412, 417.) The State Parties have always considered Secretarial Orders regarding boundary disputes as functional for Department of the Interior administrative purposes only, and therefore they had no interest in challenging such Orders when first issued. This was certainly a reasonable conclusion in view of the lack of any judicial process precedent to the issuance of these Orders. Why should interested parties have the burden of either challenging or being bound to decisions regarding which they were given no opportunity to present their views?

The United States' argument has turned logic upside-down. The Secretary issues an Order on a boundary and then the United States waits, in one case, ten years before informing the State Parties that it will rely on this Order as a final boundary determination for the purpose of claiming water rights. Should the State Parties have the burden of reading the mind of the United States regarding the status it may someday attach to a Secretarial Order issued, by all appearances, merely for internal Departmental purposes? The burden should not be on the State Parties but on the United States. The United States should not only carry the

burden to prove practicably irrigable acreage but to prove the underlying reservation boundary enlargements upon which the water rights depend.

The present Motion put the State Parties on notice of the United States' intention to rely on Secretarial Orders for the purposes of establishing water rights. Even assuming the Secretary had the requisite judicial power, the diligence of the State Parties cannot be measured until the date of that Motion, December 1978. The State Parties therefore do hereby declare that most, if not all, of them desire to challenge those Orders in a judicial proceeding and do hereby request this Court, through its Special Master, to hear and rule upon those challenges so as to finally determine the boundary disputes for purposes of establishing water rights. The State Parties are entitled to and claim the right to the day in court they were never given by the Department of the Interior.

C. The Federal Court Cases Are Not Final Determinations of Reservation Boundaries for Purposes of Establishing Water Rights.

The federal court cases relied upon by the United States to "finally" determine reservation boundaries were quiet title, ejectment and trespass actions. The State Parties were not party to these actions and their rights were therefore not adjudged. It is well settled that the doctrine of *res judicata* does not operate to affect strangers to a judgment, that is, to affect the rights of those who are neither parties nor in privity with a party. (See *Sutphen Estates v. United States* (1951) 342 U.S. 19, *reh. den.* 342 U.S. 907 (1952); *Keokuk & Western R. Co. v. Missouri* (1894) 152 U.S. 301; *Dillard v. McKnight* (1949) 34 Cal.2d 209,

209 P.2d 387.) The rule denying a *res judicata* effect against a stranger has been applied regardless of the fact that the stranger knew of the prior action and might have intervened. (See *O'Hara v. Pittston Co.* (1947) 42 S.E.2d 269.)

The rule denying the right to apply the doctrine of *res judicata* as against strangers to the prior action is based upon principles of justice, fairness, and requirements of due process of law. (See *Bruszewski v. United States* (3rd Cir. 1950) 181 F.2d 419, *cert. den.* 340 U.S. 865 (1950); *Graves v. Associated Transport, Inc.* (4th Cir. 1965) 344 F.2d 894; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 122 P.2d 892.) The reason for the rule is based on the fact that a stranger to an action does not have the opportunity available to the parties to prove or ascertain the truth of the questions at issue. (See *Hale v. Finch* (1881) 104 U.S. 261.) The justification for the rule is well illustrated by the large number of stipulated judgments confirming Tribal title that have been entered in the post-1964 Decree federal court cases.[4] In some instances, the non-Indian litigants entered into the stipulated judgments in consideration for long-term leases of the subject land from the Tribes carrying water rights with *Winters* doctrine priority dates. In the absence of these stipulated judgments, it is unlikely that the non-Indian litigants would have had any water supply for their land. In contrast to these stipulated judgments arising out of "friendly" litigation, it is note-

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[4]Stipulated judgments were entered in the following cases: *United States v. Denham*, 73-495-ALS (U.S. D.C., 1975); *United States v. Curtis*, 72-1624-DWW (U.S. D.C., 1977); *Cocopah Tribe of Indians v. Rogers*, 70-573-PHX-WEC (1975); *United States v. Brigham Young University*, 72-3058-DWW (U.S. D.C., 1976).

worthy that in the adversary proceedings before the Special Master a majority of the boundary claims asserted by the United States were defeated.

It is well established under both Arizona and California law that a court in quiet title actions and ejectment proceedings may not adjudicate the rights of persons who are not parties to the action. (*Conway v. Mosher* (1940) 55 Ariz. 307, 101 Pac. 209; *Lake Merced Golf & Country Club v. Ocean Shore R.R. Co.* (1926) 206 Cal.App.2d 421, 23 Cal.Rptr. 881; *Hurt v. Jones* (1956) 147 Cal.App.2d 164, 304 P.2d 786; *Fogarty v. Sparks* (1963) 22 Cal. 142; *Wattson v. Dowling* (1864) 26 Cal. 124.)

The application of state law over federal common law is proper under the doctrine of *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64. *Erie* requires federal courts to apply state substantive law in determining any issue or claim which has its source in state law. State law is controlling in determining all questions affecting what constitutes possession of land and generally all questions affecting real estate. (See *Barney v. Keokuk* (1876) 94 U.S. 324; *State Land Bd. v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363; Moore's Federal Practice, §0.302[4], pp. 3015-3016.)

IV

The Reservation Boundary Disputes Are Ripe for Judicial Determination for the Limited Purpose of Resolving Water Rights Claims.

None of the reservation boundary disputes have been finally determined for purpose of establishing water rights. The State Parties contend, however, that all these disputes are ripe for judicial determination. An issue is normally ripe for judicial determination when

interests of the plaintiff are in fact subjected to or imminently threatened with substantial injury. (See *Allegheny Corp. v. Breswick & Co.* (1957) 353 U.S. 151, *reh. den.* 353 U.S. 989 (1957); *Frozen Food Express v. United States* (1956) 351 U.S. 40.) Some of the Tribes are presently using Colorado River water on the disputed areas in excess of the allocations set forth in the 1964 Decree.[5] In certain circumstances, the continued, unchallenged utilization of Colorado River water by the Tribes could give rise to claims of water rights by adverse possession or some other equitable principle. Since the Tribes have early priority dates, any increase in their water rights is adverse to those of non-Indian rights holders by pushing them down the priority ladder. This is particularly true in the case of the Coachella Valley County Water District and the Metropolitan Water District. An increase in Indian rights would reduce the amount of water available to satisfy their contractual entitlements pursuant to their lower priority rights among California water users under the Seven-Party Agreement. (Wilbur and Ely, *The Hoover Dam Documents* (1948), Appendix 1003.)

Beyond this, the State Parties believe that they as well as the Five Tribes would be best served by the certainty and predictability of water availability inherent in the most expedient resolution of all outstanding claims to Colorado River water. For examples, we again look to both the Metropolitan Water District

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[5]See Raymond S. Simpson's Motion for Leave to Intervene as Indispensable Parties by the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, and the Quechan Tribe of the Fort Yuma Indian Reservation filed December 23, 1977 at pages 10-11 and in Brief in support of said motion at page 25.

and the State of Arizona. The ripeness of the boundary disputes is increased by Metropolitan's anticipated loss of Colorado River water. As a result of the Opinion (373 U.S. 546) and Decree (376 U.S. 340) of this Court, Metropolitan's entitlement to Colorado River water will be reduced from 1,212,000 acre-feet per year to no more than 550,000 acre-feet per year when Arizona and Nevada utilize their entitlements. Under the provisions of the Colorado River Basin Project Act, 43 U.S. Code sections 1501 *et seq.* (1968), Congress authorized the Central Arizona Project (CAP) to enable Arizona to make use of its apportionment of Colorado River water. The CAP authorization also increases the ripeness of the boundary disputes as to Arizona. The portion of Arizona's total entitlement available to the CAP will be reduced by any additional Indian water rights in Arizona. These conditions did not exist in 1964 when this Court rejected Special Master Rifkind's decision to determine the boundaries. The time is ripe to achieve a degree of certainty among Colorado River water users as to their entitlements to water.

V

This Court, Through Its Special Master, Should Determine All Boundary Disputes for the Limited Purpose of Resolving Water Rights Claims.

We have seen that none of the boundary disputes have been finally determined for the purpose of establishing water rights, and therefore these matters cannot be resolved by this Court merely finding how much

practicably irrigable acreage lies within allegedly enlarged reservation boundaries. We have also seen, however, that these boundary disputes are ripe for judicial determination and that it is in the interest of the State Parties as well as the Five Tribes to expeditiously determine all unresolved Indian tribe claims to additional water rights. The State Parties therefore believe and urge that this Court, through its Special Master, should receive evidence, hear legal arguments, and resolve each of these boundary disputes, but only for the limited purpose of potentially establishing additional water rights. Any dispute resolved so as to enlarge 1964 reservation boundaries would then lead to the second step, the determination of additional practicably irrigable acreage for the purpose of establishing water rights.

Such an approach is the only expedient way to resolve the boundary lands claims. If this Court does not undertake to resolve the boundary disputes, then such must occur piecemeal in lower courts. Years could pass before every dispute is finally determined through the appellate process; and then any dispute resolved favorably to an Indian tribe would still have to come back to this Court for a determination of practicably irrigable acreage and establishment of water rights. By contrast, this Court, through the Special Master, can now resolve all the disputes at one time, and establish water rights where appropriate.

Such an approach is not only expedient, but legally appropriate. The State Parties recognize that this is

a water rights lawsuit, not a land title adjudication, but agree with the United States that boundaries can be determined for the limited purpose of establishing water rights. When Special Master Simon Rifkind proposed to determine the Colorado River Indian Reservation boundary in 1960, the California Defendants expressed their concern:

> "It is . . . definitely of the first magnitude if it is in any way to be a binding adjudication of land titles or political jurisdiction. Indeed, it is a major lawsuit in itself, involving substantial private and sovereign interests." (Opening Brief of the California Defendants in Support of their Exceptions to the Report of the Special Master, May 22, 1961, p. 279.)

They were concerned that private individuals, not parties to the lawsuit, would have their land title claims adjudicated and that the determination regarding riparian lands along the mainstream of the Colorado River would affect the boundary between the States of Arizona and California. The California Defendants therefore proposed a disclaimer in the event the Court decided to determine the boundary as the Special Master recommended. That disclaimer would have provided that such a determination would not affect:

> "Any right, claim, or interest in land, or jurisdiction with respect to land, by any person, natural, corporate, or political, whether or not a party to this case." (Opening Brief of the California Defendants, *supra*, at 280.)

This Court declined to make the determination recommended by the Special Master, so the disclaimer was

unnecessary. (Opinion of the Court, 373 U.S. 546, 601.)

The State Parties today have the same concern as the California Defendants in 1961. We believe that this Court should now determine all the reservation boundaries but should only do so with the above disclaimer.[6]

It is not entirely clear whether this Court declined to determine boundary disputes in its 1963 Opinion because the disputes were not then ripe for adjudication or because this was not the appropriate lawsuit or court in which to make such determination. The State Parties are convinced, however, that this is precisely the proper lawsuit and court in which the boundary disputes underlying water rights claims central to this case must be resolved. So long as boundary determinations are made for the limited purpose of resolving water rights claims, nothing could be more germane or appropriate to this very lawsuit.

Conclusion.

This Court, through its Special Master, should not recalculate practicably irrigable acreage within the 1964 reservation boundaries. The Court should, however, resolve all reservation boundary disputes for the limited purpose of determining whether any of the Five Tribes

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[6]If this Court should elect to determine boundaries but refuse to adopt this disclaimer, then it would be necessary to join as parties all persons with land title claims in the disputed areas and to allow all such persons and political entities to fully present their positions.

are entitled to additional water rights, and if so, in what quantity. Those disputes have not heretofore been resolved but are now ripe for adjudication. It is in the interest of the State Parties as well as the Five Tribes for this Court, through its Special Master, to settle these questions.

Respectfully submitted,

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EXHIBIT A.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Mr. Robert P. Will
General Counsel
The Metropolitan Water District
of Southern California
Box 54153
Los Angeles, CA 90054

JAN 3 1979

Dear Mr. Will:

Secretary Andrus has asked me to respond to your letter of December 11, 1978, concerning the resolution of Indian boundary disputes for reservations along the Lower Colorado River. In December 1978, the Solicitor General of the United States filed a petition in the Supreme Court in which additional water is sought for each of the five reservations. The petition, a copy of which is enclosed, sets forth with specificity the position of the United States with respect to each of the boundary determinations and the legal effect of the various determinations made by this Department.

None of the five tribes have made application for further boundary changes so far as I am aware. Our office does not plan to recommend the initiation of any district court litigation to adjudicate reservation boundaries. For our purposes, we consider the administrative determinations to be final.

You asked us to advise you as to any administrative procedures available to challenge this Department's administrative determinations in settling the reservation boundary questions. While decisions of subordinate officials are subject to an elaborate review procedure within the Department, there are no comparable procedures available for the review of Secretarial decisions. Review of such matters must take place in a judicial forum.

In the event this letter and the enclosure does not fully answer your questions, please feel free to contact Mr. Dan Rosenfelt of my staff who will be pleased to provide you with such additional information as you may need. Mr. Rosenfelt can be reached at (202) 343-6967.

Sincerely,

Frederick N. Ferguson

DEPUTY SOLICITOR

Enclosure

Supreme Court, U. S.
FILED
FEB 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 8, Original

STATE OF ARIZONA, *Complainant*,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO, *Defendants*,

UNITED STATES OF AMERICA and STATE OF NEVADA, *Intervenors*,

STATE OF NEW MEXICO and STATE OF UTAH, *Impleaded Defendants*.

RESPONSE OF THE COLORADO RIVER INDIAN TRIBES AND THE COCOPAH INDIAN TRIBE TO MOTION OF THE UNITED STATES FOR MODIFICATION OF DECREE

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I.

INTRODUCTION

The Colorado River Indian Tribes and the Cocopah Indian Tribe (herein "the two Tribes") jointly filed their Motion for Leave to Intervene and Petition of

Intervention on April 10, 1978. That motion has been referred to the Special Master by the Order of this Court of January 9, 1979.

The United States, on December 21, 1978, filed its Motion for Modification of Decree and Supporting Memorandum which presumably also is to be considered by the Special Master. That motion seeks adjudication of additional water rights for the benefit of the two Tribes, and three other Indian tribes.

Inasmuch as the motion of the two Tribes has not yet been ruled upon, the status of the two Tribes in this suit is unresolved. Nevertheless they believe it appropriate to advise this Court and the Special Master of their position upon the pending motion of the United States.

II.

THE TWO TRIBES ADOPT AND APPROVE THE UNITED STATES' REQUESTED ADJUDICATION AND MODIFICATION OF THE DECREE OF MARCH 9, 1964, EXCEPT THAT THE COLORADO RIVER INDIAN TRIBES RESERVE THE RIGHT TO SEEK ADDITIONAL WATER RIGHTS FOR OMITTED LANDS

The two Tribes concur in the legal analysis of the United States upon which the requested adjudication and modification of the Decree of March 9, 1964, is predicated. They also approve the proposed adjudications themselves, but without waiver or compromise of the claims of the Colorado River Indian Tribes for additional water rights for omitted lands, as the term "omitted lands" is explained in the motion of the United States, at page 6.

As set forth in the motion of the two Tribes, the Colorado River Indian Tribes claim additional present perfected rights to water from the Colorado River

computed upon an additional 37,449 irrigable acres of omitted lands, *see* page 9 of the two Tribes Motion for Leave to Intervene. By its motion, the United States seeks on behalf of the Colorado River Indian Tribes adjudication of additional water rights based upon only 15,000 additional acres of omitted lands. While supporting the United States' request to adjudicate those additional rights, the Colorado River Indian Tribes reserve and reassert their claim to the difference, or water rights based upon an additional 22,449 irrigable acres of omitted lands. The position and motion of the United States are not inconsistent with or opposed to such additional assertions by the Colorado River Indian Tribes, *see,* page 7 of the motion of the United States, including footnote 1.

The Colorado River Indian Tribes do fully adopt and approve the adjudication requested by the United States for boundary lands, and the Cocopah Indian Tribe fully adopts and approves the adjudication requested by the United States for both boundary lands and omitted lands, in their respective reservations.

III.

INDIAN WATER RIGHTS ARE DETERMINED EXCLUSIVELY BY THE AMOUNT OF WATER NECESSARY TO IRRIGATE PRACTICABLY IRRIGABLE ACREAGE

On page 29 of its motion, the United States declares that the prior Special Master ". . . suggested a ceiling on the tribal water rights, which this Court approved as 'reasonable' ". The two Tribes would take exception to that statement if construed to mean that there is any further "ceiling", restriction or limitation, imposed upon Indian water rights which are measured by the specific determination of irrigable acres and the

amounts of diversion necessary to supply the consumptive use for irrigation of those acres. Specifically, there is no subjective or other indefinite criteria such as "reasonableness" upon the exercise of those rights. As shown at pages 263-264 of the Report of December 5, 1960, of the prior Special Master, and by the Opinion of this Court of June 3, 1963, 373 U.S. 546 at 600-601, adjudicated Indian water rights are determined exclusively by the amount of irrigable acreage and the amount of water necessary to irrigate such acreage, without any further ceiling.

IV.

THE DECREE OF MARCH 9, 1964, DOES NOT BAR ADJUDICATION OF ADDITIONAL WATER FOR OMITTED LANDS

The United States in its memorandum supporting its motion effectively addresses the question of whether the Decree of March 9, 1964, would bar by application of *res judicata* the adjudication sought by the motion of the United States. In addition to the arguments presented by the United States in its memorandum, the two Tribes reassert their position that the 1964 Decree does not bar relief by *res judicata* with respect to omitted lands because of the existence of a conflict of interest attributable to the government's representation of their interests. The arguments of the two Tribes and their citations of authority appearing on pages 9 and 10 of their motion of April 10, 1978, are incorporated herein.

V.

CONCLUSION

The two Tribes fully support the motion of the United States except insofar as it may be construed to impose a "ceiling" on Indian water rights other than as set forth in Part III, above, and without waiver of the Colorado River Indian Tribes' right to seek additional water for omitted lands.

Respectfully submitted,

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DEFENDANTS

THE UNITED STATES OF AMERICA AND STATE OF NEVADA,
INTERVENERS

STATE OF UTAH AND STATE OF NEW MEXICO,
IMPLEADED DEFENDANTS

COLORADO RIVER INDIAN TRIBES, FORT MOJAVE INDIAN TRIBE, CHEMEHUEVI INDIAN TRIBE, COCOPAH INDIAN TRIBE, AND FORT YUMA (QUECHAN) INDIAN TRIPE,
RECOMMENDED INTERVENERS

Elbert P. Tuttle, *Special Master*

MEMORANDUM AND REPORT ON PRELIMINARY ISSUES

August 28, 1979

While a motion for a determination of present perfected rights and a supplementary decree pursuant to Article VI of the Supreme Court's 1964 decree was pending,[1] five Indian tribes ("the Tribes") whose reservations are located along the lower basin of the Colorado River, and who are the beneficial owners of water diversion rights declared in the 1964 decree,[2] moved to intervene in this case. The Fort Mojave Tribe, the Chemehuevi Tribe, and the Quechan Tribe of the Fort Yuma Reservation ("the Three Tribes"), joined by the National Congress of American Indians and the Confederation of Indian Tribes of the Colorado River as amici curiae, moved to intervene as "indispensible par-

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1. *Arizona v. California*, 376 U.S. 340, 351 (1964), *carrying into effect* 373 U.S. 546 (1963). Article VI of the decree provided that

> [w]ithin two years from the date of this decree, the States of Arizona, California, and Nevada shall furnish to this Court and to the Secretary of the Interior a list of the present perfected rights, with their claimed priority dates, in waters of the mainstream within each State, respectively, in terms of consumptive use, except those relating to federal establishments. Any named party to this proceeding may present its claim of present perfected rights or its opposition to the claims of others. The Secretary of the Interior shall supply similar information, within a similar period of time, with respect to the claims of the United States to present perfected rights within each State. If the parties and the Secretary of the Interior are unable at that time to agree on the present perfected rights to the use of mainstream water in each State, and their priority dates, any party may apply to the Court for the determination of such rights by the Court.

The Court later amended this article to extend the time for cataloguing of present perfected rights. 383 U.S. 268 (1966). The States and their political subdivisions were able to reach agreement among themselves as to the scope of present perfected rights but were unable to reach agreement with the United States. On May 3, 1977, the State parties filed a joint motion for determination of present perfected rights and the entry of a supplemental decree, and a proposed supplemental decree. The United States and the State parties subsequently reached agreement on the terms of a proposed decree and all parties filed a joint motion.

2. *See* 376 U.S. at 343-45; 373 U.S. at 575-601.

ties."[3] They opposed entry of a supplemental decree, both as initially proposed by the States and the political subdivisions of California ("the State parties") and as subsequently joined by the United States. They also sought to raise claims to present perfected rights appurtenant to irrigable acreage within disputed boundaries of the reservations but outside the boundaries conceded for the purpose of the 1964 decree ("additional boundary lands"), as well as to irrigable acreage within the conceded boundaries of the reservations but not claimed by the United States in hearings before the Special Master prior to the Court's 1963 decision and 1964 decree ("omitted lands"). Three days after the Three Tribes filed their motion, the Colorado River Indian Tribe and the Cocopah Tribe ("the Two Tribes") filed a motion to intervene to present similar claims as additional claims pursuant to Articles II(D)(5)[4] and IX[5] of the decree and not in opposition

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3. The motion initially was improperly filed on February 23, 1977, without a proposed pleading, *see* Supreme Court Rule 9(3), and without the Confederation of the Indian Tribes of the Colorado River joining. The motion was refiled April 7, 1978, this time joined by the Confederation.

4. Article II(D)(5) contains the following proviso to the Court's allocation of diversion rights for the Fort Mojave and Colorado River Indian Reservations:

> the quantities fixed in this paragraph [establishing diversion rights for the Fort Mojave Reservation] and paragraph (4) [establishing diversion rights for the Colorado River Indian Reservation] shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined; . . .

376 U.S. at 345.

5. Article IX provides:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

to entry of the supplemental decree proposed by the United States and the State parties. On December 19, 1978, while a decision as to the motion for a supplemental decree was pending, the United States filed a motion to modify the Court's decree pursuant to Articles II(D)(5) and IX, presenting on behalf of the five Indian tribes claims for diversion rights appurtenant to additional boundary lands and omitted lands on all five reservations. With one exception, the total irrigable acreage which the United States claims for each reservation in this motion differs significantly from that claimed by the Tribes on their own behalfs.[6]

On January 9, 1979, the Supreme Court adopted and issued the supplemental decree proposed by the

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6. The United States claim for the Cocopah Reservation is greater than that of the Cocopah Tribe. The following tables illustrate for each reservation (columns) the irrigable acreage and total annual diversions of water claimed by the Tribes and by the United States.

I. ADDITIONAL BOUNDARY LANDS (irrigable acres)

	Ft. Mojave	Chemehuevi	Colorado River	Ft. Yuma	Cocopah
Three Tribes	4,700	150	—	13,000	—
Two Tribes	—	—	2,710	—	780
United States	3,000	150	3,110	5,500	1,112

II. OMITTED LANDS (irrigable acres)

	Ft. Mojave	Chemehuevi	Colorado River	Ft. Yuma	Cocopah
Three Tribes	7,100	2,350	—	4,800	—
Two Tribes	—	—	37,449	—	Undetermined
United States	1,250	500	15,000	500	33

III. TOTAL CLAIMS (irrigable acres/acre-feet annual diversion)

	Ft. Mojave	Chemehuevi	Colorado River	Ft. Yuma	Cocopah
Three Tribes	12,800/ 82,800	2,500/ 14,900	—	17,800/ 118,700	—
Two Tribes	—	—	40,159/ 262,861	—	780+/ 4,969+
United States	4,250/ 27,455	650/ 3,880	18,110/ 120,794	6,000/ 40,000	1,145/ 7,294

State parties and the United States. The supplemental decree renewed the determination of present perfected rights of the Indian reservations in the 1964 decree, giving them priority over all other present perfected rights in times of shortage. The declaration of present perfected rights was made subject to the following provisions:

> (2) This determination shall in no way affect future adjustments resulting from determinations relating to settlement of Indian reservation boundaries referred to in Art. II(D)(5) of said Decree.
> (3) Article IX of said Decree is not affected by this list of present perfected rights.
>
> . . .
>
> (5) [T]he quantities in paragraphs (1) through (5) of Art. II(D) of said Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined. Additional present perfected rights so adjudicated by such adjustment shall be in annual quantities not to exceed the quantities of mainstream water necessary to supply the consumptive use[7] required for irrigation of the practicably irrigable acres which are included within any area determined to be within a reservation by such final determination of a boundary and for the satisfaction of related uses. The quantities of diversions are to be computed by determining net practicably irrigable acres within each additional area using the methods set forth by the Special Master in this case in his Report to this Court dated December 5, 1960, . . .

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7. The 1964 decree defines "consumptive use" as "diversions from the stream less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican Treaty obligation." 376 U.S. at 340.

The Court denied the motion of the Three Tribes, et al., to intervene insofar as the motion sought to oppose entry of a supplemental decree. In all other respects that motion and the motion of the Two Tribes were referred to me as Special Master.

On March 29, 1979, following an informal conference, I presented to the parties and the movants for intervention three questions for argument in San Francisco, California, on April 17, 1979:

> (1) Have "the boundaries of the respective [Indian] reservations . . . [been] finally determined" within the meaning of Art. II(D)(5) of the March 9, 1964 Decree, 376 U.S. 340?
> (2) Does the Eleventh Amendment bar intervention in this suit by the Indian Tribes without the consent of the State parties?
> (3) Is there a procedure whereby the Indian Tribes may appear and participate as if they were parties pending a ruling on their motions to intervene?

I conducted a hearing and received both preargument and supplemental briefs on these questions. At the hearing, all the parties agreed also to submit for my determination the motions of the two groups of Indian Tribes to intervene.

I have decided to grant the Indian Tribes leave to intervene in subsequent proceedings before me. This decision necessarily encompasses the conclusion that the Eleventh Amendment does not bar such intervention, and obviates the need to consider alternatives to intervention. The role of the intervenors in these proceedings will be unconditional; the United States shall, at its discretion, continue as a party.

The scope of such subsequent proceedings will not include a de novo determination of the boundaries of the Indian reservations, but will include proof of the irrigability of omitted lands. I have concluded that, for

the purposes of the determination of reservation water rights in this litigation, boundary determinations made by the district courts and by the Secretary of the Interior are final. I have not decided whether or on what basis the January, 1979, decree may be modified to establish additional present perfected rights appurtenant to omitted lands. I have decided, however, that the full and final determination of this case can best be guaranteed by deferring that decision until after the Tribes and the United States produce evidence concerning omitted lands.

I. Motions to Intervene

A

Consideration of the motions to intervene is guided to the extent appropriate by Rule 24 of the Federal Rules of Civil Procedure. Supreme Court Rule 9(2).[8] Rule 24 provides for intervention on the following grounds:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the appli-

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8. This guidance is somewhat tentative. Rule 9(2) provides that the Federal Rules are a guide in original actions in the Supreme Court only "where their application is appropriate," and the peculiarities of original proceedings may require ad hoc variations in the procedures which apply in ordinary litigation. *See Utah v. United States*, 394 U.S. 89, 95 (1969); *Rhode Island v. Massachusetts*, 39 U.S. (14 Pet.) 210, 257 (1840). Moreover, Rule 24 itself is not a comprehensive inventory of the bases on which intervention may be allowed. *Missouri-Kansas Pipeline Co. v. United States*, 312 U.S. 502, 505-08 (1941).

> cant's interest is adequately represented by existing parties.
>
> (b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: . . . (2) when applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

It is obvious that the Indian Tribes have interests which will be affected by any litigation which takes place in this case.[9] The only substantive issue pending in this litigation is the determination of land questions on which depend the present perfected rights of which the Tribes are the beneficial owners. As a result of the motion by the United States to modify the decree, this issue is presented even if the Tribes are unable to intervene. The Tribes' direct pecuniary interests will not be just affected but will be determined by this litigation since the United States' role as guardian of the Indian interests will bind the Tribes to any judgment concerning their rights even if they do not participate. *Heckman v. United States,* 224 U.S. 413, 444-45 (1912); *Pueblo of Picuris v. Abeyta,* 50 F.2d 12, 14 (10th Cir. 1931). The Tribes' interest in this litigation thus meets the narrowest legal predicate for intervention.[10] The Tribes' stake is palpable as well as legally cognizable; the history of this case is testimony to the precious value of water rights in the lower Colorado

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9. As counsel for the Metropolitan Water District characterized the issue in oral argument, there is little doubt as to the possibility of intervention, only as to its desirability.

10. *Cf. Sam Fox Publishing Co., Inc. v. United States,* 366 U.S. 683, 690-93 (1961)(underlying action must have res judicata affect on intervenor); *SEC v. United States Realty & Improvement Co.,* 310 U.S. 434, 458-61 (1940)(intervenor had direct pecuniary interest).

Basin. *See Arizona v. California*, 373 U.S. 546, 598-99 (1963). Common sense suggests that those most directly affected by the litigation should be able to assert their own interests.

It is also evident that their status as beneficial owners of the land and water rights to which the United States has legal title as trustee is no obstacle to the Tribes' capacity to bring court action to assert their property rights. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 368-69 (1968) and cases cited at 370-72. The trusteeship of the United States exists "to prepare the Indians to take their place as independent qualified members of the modern body politic," *id.* at 369 (*quoting Board of County Commissioners v. Seber*, 318 U.S. 705, 715 (1943)), a goal reinforced by a federal policy which has placed increased emphasis on tribal self-government, *see Bryan v. Itasca County*, 426 U.S. 373, 388-89 n.14 (1976). It would be self-defeating if the fact of federal trusteeship were to defeat the Tribes' effort to exercise self-government and full citizenship in this case.

B

Their beneficiary status nevertheless presents the question whether the Tribes' interests are adequately represented by the United States as trustee. In *Heckman v. United States*, 224 U.S. 413 (1912), the Court spoke expansively of the role of the United States as a litigant on behalf of Indians: "[t]here can be no more complete representation. . . ." *Id.* at 444. In this case, although all the State parties with the exception of Arizona do not oppose intervention altogether, they do oppose any intervention which includes as a premise the inadequacy of the representation of

the Tribes' interests.[11] Arizona opposes any intervention at all as superfluous in light of the government's representation of the Tribes' interests.[12] The United States quite understandably upholds the adequacy of its representation of the Indians while supporting the motions to intervene.[13]

The Tribes assert that this representation is inadequate in two respects. First, the United States has a conflict of interest in its representation of the Tribes because it also has represented its own proprietary interests on behalf of non-Indian federal establishments in the Colorado Basin, and, more significantly, represents the Bureau of Reclamation, which operates projects along the river and contracts with the State parties for the delivery of river water.[14] The United

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11. Memorandum of the States of Arizona, California and Nevada, et al., Regarding Certain Preliminary Issues 11 (filed with Special Master, April 13, 1979); Response of the States of California and Nevada, et al., to the Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe for Leave to Intervene 10, 13-14 (filed June 2, 1978).

12. Memorandum of the States of Arizona, California and Nevada, et al., *supra* note 1, at 6-11; Response of the State of Arizona to the Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe for Leave to Intervene 3-4 (filed June 5, 1978).

13. Memorandum for the United States on Preliminary Issues 21-22 (filed with Special Master, April 13, 1979); Memorandum for the United States on Motions for Leave to Intervene 10 (filed May 31, 1978); Memorandum for the United States on Motion for Leave to Intervene 4 n.2, 11 (filed Feb. 24, 1978).

14. Concurrent representation of the Bureau of Reclamation is an especially sore point. The Bureau and Indian tribes have been frequent adversaries in administrative channels, administrative proceedings, and litigation. *See* SUBCOMM. ON ADMINISTRATIVE PRACTICE & PROCEDURE, SENATE COMM. ON THE JUDICIARY, 92d Cong., 1st Sess., HEARINGS ON FEDERAL PROTECTION OF INDIAN RESOURCES, 1629-77 (Comm. Print 1972)(Correspondence and Materials Relating to Bureau of Reclamation Programs Affecting Indians); *see generally id. passim.* (The hearings produced an outpouring of Indian resentment against the Bureau from tribes throughout the west and southwest, leading Senator Kennedy, Chairman of the Subcommittee on Administrative Practice & Procedure, to conclude that "the Reclamation Bureau, in the Indian people's eyes, is

States also is central in the management and control of the Colorado River system.[15] Moreover, the Two Tribes assert, even the interests of the Tribes among themselves are potentially adverse[16] so that the Tribes should not be jointly represented. Second, the United States has failed to discharge its fiduciary duties by its delay in the determination of reservation boundaries, causing the Tribes to lose the enjoyment of the additional water to which an adjustment of the reservation boundaries entitles them; and by its failure in the initial proceedings before the Special Master and the Supreme Court to present claims for additional irrigable acreage within the conceded reservation boundaries.

The present posture of the case diminishes the extent to which the asserted conflict of proprietary interests might affect the outcome of the case. Simultaneous representation by the United States of its own proprietary interests and those of the Indian tribes might well entitle the Tribes to intervene.[17] Although

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the present-day institutional embodiment of General Custer." *Id.* at 398).

15. In addition to legislation of general effect, *e.g.*, the National Reclamation Act, 43 Stat. 701, *codified at various provisions of* 43 U.S.C., the following provisions directly deal with the Colorado River: The Boulder Canyon Project Act, 43 U.S.C. §§ 617 *et seq.*; The Boulder Canyon Project Adjustment Act, *id.* §§ 618 *et seq.*; The Colorado River Compact Act, *id.* § 617; The Colorado River Storage Project Act, *id.* §§ 620-620o; The Colorado River Basin Project Act, *id.* §§ 1501 *et seq.*; and The Colorado River Basin Salinity Control Act, *id.* §§ 1571 *et seq.*.

16. Though joint movants for intervention, the Two Tribes are each represented by different counsel.

17. *See New Mexico v. Aamodt*, 537 F.2d 1102, 1106-07 (10th Cir. 1976); Special Presidential Message to Congress on Indian Affairs, 1970 Pub. Papers 569, 573 (July 8, 1970); ABA CODE OF PROFESSIONAL RESPONSIBILITY, *Canon* 35, EC 5-15, 5-23, DR 5-101; *Luke* 16:13; Chambers, *Discharge of the Federal Trust Responsibility to Enforce Claims of Indian Tribes: Case Studies of Bureaucratic Conflict of Interest*, *in* SUBCOMM. ON ADMINISTRATIVE PRACTICE & PROCEDURE HEARINGS, *supra* note 14, at 295. *Cf.* 25 U.S.C. § 81a (providing for contracts for attorneys for Indian tribes in claims against United States). *See generally* SUBCOMM.

the United States does not abandon its status as a non-trustee, however, it is not called on to assert its own interests in this litigation, since the present proceedings concern exclusively the extent of the Indians' water rights. All other rights are fixed by the March 9, 1964, and January 9, 1979, decrees. Accordingly, the United States is not called on to advance distinct, potentially adverse interests in the course of the litigation now pending.[18]

There nevertheless remain differences between the interests of the United States and those of the Indian tribes. Most noticeable is the difference in their claims. The claim by the United States was not filed until after the Tribes had already moved to intervene and complained of delay by the United States in claiming on their behalfs. At least in their pleadings, the United States and the Tribes claim significantly different amounts of irrigable acreage. See note 6, *supra*. To the extent of these differences the Indian claims are not actually represented. These disparities are greatest in the claims for omitted lands. The effect of these differences is magnified insofar as the issue whether or on what basis omitted lands are properly the subject of a modified decree may be affected by the adequacy of the government's representation of the Tribes in prior proceedings. In this respect, the Tribes and the United States have distinctly different interests. Regardless of the past or present actual adequacy of the United

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ON ADMINISTRATIVE PRACTICE & PROCEDURE HEARINGS, *supra*. *But compare Pueblo of Picuris v. Abeyta*, 50 F.2d 12, 14 (10th Cir. 1931) *with Smuck v. Hobson*, 408 F.2d 175, 181-82 (D.C.Cir. 1969)(en banc).

18. The potential conflicts do not vanish altogether, and were the United States a private attorney, might constitute an ethical conflict. Such conflicts are inevitable in government litigation, however, especially involving the United States Government, and unless yielding some perceptible effect, should not impeach the government's capacity as a litigant.

States' representation of the Indians, they have different capacities to raise these issues. If, as the Court observed in *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 374 (1968), "the Indian's right to sue should not depend on the good judgment or zeal of a Government attorney . . .," it is difficult to conceive why the same is not true of the scope of rights asserted in a suit on behalf of Indian tribes.

Beyond these specific differences exists a less tangible difference in legally cognizable interests. When the United States litigates in its capacity as trustee for Indian tribes, it acts not merely on behalf of the Indians' proprietary rights, but also "the governmental rights of the United States." *Heckman v. United States*, 224 U.S. 413, 438 (1912). It exercises the plenary powers of the United States to regulate Indian affairs. U.S. CONST. Art. I, § 8(3). As such, the United States answers to a different constituency than do the Tribes. In its representation of the Tribes, though it must reasonably fulfill the nation's trust obligations or face the prospect of liability for their breach,[19] the United States also acts on considerations of Indian policy or other national concerns which may yield a different litigation position than the represented Tribes themselves would reach.[20]

The presence of closely related but not identical interests in this case closely parallels *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972). There, a defeated candidate for union office sought to intervene in a suit by the Secretary of Labor for enforcement of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 482 *et. seq.* Rejecting the argument

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19. *Cf. United States v. Mason*, 412 U.S. 391 (1973)(no breach of duty found).

20. *See* Special Presidential Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 573 (July 8, 1970).

that the individual union member was adequately represented by the Secretary of Labor, the Court distinguished between the Secretary's role as a lawyer for the individual grievance and as agent for the public interest in free and democratic union elections. "Even if the Secretary is performing his duties, broadly conceived, the union member may have a valid complaint about the performance of 'his lawyer.' " *Id.* at 539. The same may be said for the Indian Tribes in this case. Even though the United States may be satisfying its trust obligations adequately, the Indians have a complaint about their lawyer. In general, the Tribes are probably the best judges of the adequacy of representation of their interests. *See* 3B MOORE'S FEDERAL PRACTICE ¶ 24.09-1[4] (2d ed. 1979)[21]; Shapiro, *Some Thoughts on Intervention before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 746 (1968). Here, the Tribes' direct and immediate interest in the subject of this litigation and the special sensitivity of the United States' trust obligations[22] warrant particularly attentive scrutiny of their complaint about their representation and of the differences between the tribal and federal interests. Without disparaging the zeal or empathy of the government's attorneys,[23] the Tribes can only feel more keenly than the United States government the effects of the adjudication of their present perfected rights in river water. For these reasons, I find that the Tribes satisfy the "minimal" require-

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21. *Cited with approval in Trbovich, supra*, 404 U.S. at 538 n.10.

22. *See, e.g., Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 14-16 (1831).

23. Indeed, I have no basis for so treating the performance of the government attorneys who have appeared before me, and the Tribes are careful to specify that the criticism of the United States' representation does not apply to the latter. Brief of the Cocopah Tribe on Questions Propounded by the Special Master 2 n.2 (filed with Special Master, April 13, 1979). The Three Tribes and the Colorado River Indian Tribes both echoed this view in oral agrument.

ments of Rule 24 of the Federal Rules of Civil Procedure to show that representation of the intervenors' interests "may be" inadequate. *See Trbovich, supra* 404 U.S. at 538 n.10.

I conclude that it is appropriate to follow the guidance of Rule 24 in this case. Granting the motions to intervene will, as counsel for the Colorado River Indian Tribes suggests, "keep the Government's feet to the fire" and will promote the resolution of this long-standing and important national dispute. It will expand neither the dispute nor the Supreme Court's exercise of its original jurisdiction because the Indians' efforts to intervene seek not to raise new claims not already raised by the sovereigns directly concerned, *cf. Utah v. United States*, 394 U.S. 89, 96 (1969), but to quantify existing rights already presented by the United States and determined by the Court.[24]

C

The question remains whether, if the Tribes are permitted to intervene, the United States should continue to appear on their behalf. None of the State parties is willing to consent to intervention if the Tribes are concurrently represented by the United States.[25] They argue that representation of the Tribes' interests by both the Tribes themselves and the United States

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24. Intervention by a party other than a state or the United States ancillary to an original proceeding in the Supreme Court is within the Court's original jurisdiction. *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922); *see Texas v. Louisiana*, 416 U.S. 965 (1974). *But cf. Utah v. United States*, 394 U.S. 89, 96 (1969)(avoiding question).

25. Supplemental Memorandum of the State of California Regarding Certain Preliminary Issues 3-5 (filed with Special Master, May 14, 1979); Memorandum of the States of Arizona, California and Nevada, et al., *supra* note 11, at 12-15; Response of the States of California and Nevada, et al., *supra* note 11, at 13-14.

will prejudice the State parties by causing duplication, delay, and confusion.

Just as the appearance by the United States on behalf of the Tribes does not preclude the Tribes' intervention, the Tribes' intervention does not rule out continued appearance by the United States. *See Wilson v. Omaha Indian Tribe*, 439 U.S. 963 (1979) (Indian tribes sued "supported by" the United States as trustee); *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 371 (1968) (*quoting Sadler v. Public National Bank & Trust Co.*, 172 F.2d 870, 874 (10th Cir. 1949)) (Indian may sue in own right subject only to right of government "to intervene"); *Heckman v. United States*, 224 U.S. 413, 446 (1912) (Indian allottee may bring own action and the United States may "aid" him in suit); *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911) (United States joined suit on behalf of Indian plaintiff).[26] Several considerations favor the United States' participation. In those regards in which its interests as trustee differ from those of the Tribes, the United States has an independent interest in the outcome of

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26. Concurrent parallel appearances by Indian tribes and by the United States on their behalf also have been common in recent litigation in the lower federal courts, both where tribes have intervened in actions brought by the United States, *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975)(semble), *cert. denied*, 423 U.S. 1086 (1976), *aff'g* 384 F. Supp. 312 (W.D.Wash. 1974); *United States v. Montana*, 457 F.Supp. 599 (D.Mont. 1978); *United States v. Atlantic Richfield Co.*, 435 F.Supp. 1009 (D.Alas. 1977); *United States v. Truckee-Carson Irrig. Dist.*, 71 F.R.D. 10 (D.Nev. 1975), where tribes have intervened in actions brought against the United States, *County of Thurston v. Andrus*, 586 F.2d 1212 (8th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979); *City of Tacoma v. Andrus*, 457 F.Supp. 342 (D.D.C. 1978), and where parallel actions by the United States and Indian tribes have been consolidated, *Sac and Fox Tribe v. Licklider*, 576 F.2d 145 (8th Cir.), *cert. denied*, 439 U.S. 955 (1978); *United States v. Southern Pacific Trans. Co.*, 543 F.2d 676 (9th Cir. 1976); *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. 1978). *But see Pueblo of Picuris v. Abeyta*, 50 F.2d 12, 14 (10th Cir. 1931).

this litigation. Moreover the decree, insofar as it allocates the river water and provides for the present perfected rights of the Indian Reservations, operates by enjoining the United States, its officers, attorneys, agents, and employees. In addition, the United States is not bound by any adjudication obtained by Indian tribes appearing in their own right without its consent or appearance. *United States v. Candelaria*, 271 U.S. 432, 443-44 (1926); *Choctaw & Chickasaw Nations v. Seitz*, 193 F.2d 456, 458-59 (10th Cir. 1951). Accordingly, continued appearance by the United States will help secure the speedy final determination of this lawsuit.

The value of the continued presence of the United States in this litigation is not outweighed by the marginal duplication, delay, or confusion which may result. The same issues will be presented regardless of whether they are presented by the United States, the Indian tribes, or both. The Tribes and the United States have indicated that they will rely on substantially the same evidence and, where their claims differ, coordinate their presentations. It is my intention to have the order of proof and examination by the moving parties structured in a logical sequence which avoids duplication or accumulation, and where they are not, the State parties will be entitled to object. In short, there is no reason to anticipate that the parallel appearances by the United States and the Indian tribes should yield any less coordination and cooperation than I have seen from the more numerous State parties, erstwhile adversaries. Arizona, at least, is in a poor position to object to such concurrent representation of related interests after naming as defendants numerous political subdivisions of the State of California. All these have been represented by separate coun-

sel in this suit even though they could have been represented and bound by that State.[27]

D

A hurdle to the Tribes' participation in this case more fundamental than the considerations affecting the propriety of intervention is the sovereign immunity of the States reflected in the Eleventh Amendment.[28] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The amendment maintains the States' immunity from suit in federal court without their consent except where their immunity has been surrendered by the adoption of the Constitution. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-30 (1934); *Hans v. Louisiana*, 134 U.S. 1, 12-15 (1890); *see also* THE FEDERALIST No. 81 (A. Hamilton) ("unless, . . . there is a surrender of this immunity in the plan of the convention, it will remain with the state. . . .").[29] Accord-

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27. *See e.g., United States v. Nevada*, 412 U.S. 534, 538 (1973); *New Jersey v. New York*, 345 U.S. 369, 373-75 (1953).

28. The question whether the Eleventh Amendment bars intervention in an original proceeding in the Supreme Court without the consent of adverse states was presented but left open in *Utah v. United States*, 394 U.S. 89, 92 (1969)(intervention by private party); and *New Jersey v. New York*, 345 U.S. 369, 372 (1953)(intervention by city).

29. There is some uncertainty whether the States' immunity beyond the terms of the Eleventh Amendment is incorporated constitutionally into the amendment or rests solely on judicially protected sovereign immunity. *Compare Employees v. Department of Public Health & Welfare*, 411 U.S. 279, 280 n.1 (1973), *and id.* at 290-94 (Marshall, J., concurring) *with id.* at 309-15 (Brennan, J., dissenting). *See generally* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972).

ingly, I begin from the assumption that unless the sued state consents, the Eleventh Amendment excludes from federal jurisdiction suits against a state by an Indian tribe. *United States v. Minnesota*, 270 U.S. 181, 194-95 (1926).[30]

The Eleventh Amendment issue arises here because the States do not expressly consent to suit. Arizona will not consent to any intervention by the Indian tribes.[31] California, Nevada, and Utah will consent only on certain conditions: (1) above all, that the Tribes be represented only by their own counsel and not by the United States as well; and (2) that intervention be for the limited purpose of raising claims for additional boundary lands.[32] Because I am permitting the United States to represent the Tribes concurrently

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The question does not affect this decision and the terms "Eleventh Amendment," "Eleventh Amendment immunity," and "sovereign immunity" are used interchangeably to refer to the concepts those terms embody.

30. *Skokomish Indian Tribe v. France*, 269 F.2d 555, 560-62 (9th Cir. 1959); *United States ex rel. Charley v. McGowan*, 2 F.Supp. 426, 429 (W.D.Wash. 1931); *aff'd*, 62 F.2d 955 (9th Cir.), *aff'd* 290 U.S. 592 (1933). In view of Indian tribes' own sovereign status, *Puyallup Tribe v. Washington Game Department*, 433 U.S. 165 (1977), and the plenary federal interest in the regulation of Indian affairs, U.S. Const., Art. I § 8, the United States and the Colorado River Indian Tribes question that the Eleventh Amendment bars a suit against a state by an Indian tribe. *United States v. Minnesota*, *supra*, the leading authority for this premise, strictly speaking does not settle the question. There, the Court merely assumed that Indians were barred by the Eleventh Amendment from suing a state in deciding that the United States as trustee for the Indians' interests is not so barred, and made that assumption about individual Indians and not tribes. Nevertheless, I consider it unlikely that anything within the constitutional or federal structure demands the inference that the States surrendered their immunity to suit by Indian tribes. *See Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934). Because for other, less equivocal reasons I find that the Eleventh Amendment is not implicated by the Tribes' motions to intervene, I do not need to resolve this question.

31. See note 12, *supra*.

32. See note 11, *supra*.

with their own counsel and will hear, at least conditionally, evidence concerning omitted lands, leave for the Tribes to intervene does not meet the conditions of consent for California, *et al.* All the States contend that the absence of their consent absolutely bars intervention by the Indian tribes.

I conclude that the States' Eleventh Amendment immunity is not implicated by the Tribes' motions to intervene. Their claims as intervenors are ancillary to a case or controversy between a state and sister states and between the United States and states. That case or controversy—including the States and the Indian claims—is within the federal judicial power and already before the Court, and is now the subject of decrees. The Tribes' intervention is therefore within the scope of the States' constitutional surrender of immunity.

The claims of the Indian tribes are no strangers to these proceedings. They have been present in the case since the United States intervened to present claims on behalf of the Indian reservations as well as its own proprietary interests.[33] These claims are now the subject of two decrees by the Supreme Court which provide for the Tribes' present perfected rights and control water diversions by the mandatory provisions of the 1964 decree. The claims for water for additional boundary lands are direct outgrowths of these decrees, which provided for an adjustment in the present perfected rights of the reservations "in the event that the boundaries of the respective reservations are finally

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33. 344 U.S. 919 (1953). California "join[ed] in the request of the United States that this Court declare and determine the rights of the Indians and Indian Tribes." Answer of the California Defendants to Petition of Intervention on Behalf of the United States of America and Summary of Controversy 60 (filed April 5, 1954).

determined."[34] In addition, Article IX of the decree,[35] preserved by the 1979 decree,[36] makes possible the amendment of the decree's provisions. The Tribes do not now seek to present new claims against the States which will alter the allocation of water among the States as determined by the Supreme Court in its opinion and decree, nor do they seek relief which will run against the States. Rather, they seek to make the adjustment provided for in the Court's decrees and to modify the decrees in a way which will alter the allocation of water within the States.[37]

This case is the only means by which they can do so. The Supreme Court's 1964 decree controls the distribution of water in the lower Colorado River system by enjoining the United States, its officers, attorneys, agents and employees from diverting water except in accordance with the decree's provisions. 376 U.S. at 341-46. The Court's jurisdiction is exclusive to begin with, 28 U.S.C. § 1251(a)(1), and the Court has retained jurisdiction of the case for further relief "that may at any time be deemed proper in relation to the subject matter in controversy." 376 U.S. at 353.

It is hornbook law that once an entire case or controversy is within federal jurisdiction, the federal courts may entertain claims over which there is no independent basis of federal jurisdiction but which are incidental to the underlying federal case or controversy. *See Aldinger v. Howard*, 427 U.S. 1, 6-14 (1976); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, § 8 (3d ed. 1976). The doctrine of ancillary jurisdiction arose from the need to avoid hardship and

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34. Para. (5), 439 U.S. at 421 (1979); Art. II(D)(5), 376 U.S. at 343 (1964).

35. 376 U.S. at 353.

36. 439 U.S. at 421.

37. *See* note 33 *supra*.

permit the complete resolution of disputes where a federal court has complete and exclusive control of a controversy. It "is bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests, without regard to jurisdiction." *Aldinger, supra* 427 U.S. at 11. Thus, in *Freeman v. Howe,* 65 U.S. (24 How.) 450 (1861), the Court stated that claimants to property attached in a federal diversity action who had no remedy in state court could file an equitable action in federal court to prevent injustice in the diversity suit; such a suit would be "not an original suit, but ancillary and independent, supplementary merely to the original suit . . ." so that want of diversity of citizenship would not deprive the federal court of jurisdiction. *Id.* at 460. *Accord Phelps v. Oaks,* 117 U.S. 236, 241 (1886); *Stewart v. Dunham,* 115 U.S. 61, 64 (1885). Ancillary jurisdiction also permits a subsequent suit or intervention brought to effectuate a judgment concerning property in the control of the court. *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356, 364-67 (1921).

The same principles apply in original proceedings in the Supreme Court. The Supreme Court, once it has exercised its original jurisdiction over a suit involving sister states and the United States, may entertain the ancillary claims of non-sovereign litigants even though standing by themselves these claims would not be within the Court's original jurisdiction, *Texas v. Louisiana,* 416 U.S. 965 (1974), or even within federal jurisdiction, *Oklahoma v. Texas,* 258 U.S. 574, 581 (1922).

The Eleventh Amendment's jurisdictional barrier, at least in certain circumstances, yields to this extension of federal jurisdiction. The presentation of claims which are ancillary to an underlying suit is not an orig-

inal suit and does not change the character of the underlying case or controversy. *Freeman, supra* at 460 (1861). In its original form this case was a suit brought by one State against another. It was later joined by other States and by the United States. In either form, it is within federal jurisdiction, and the Court may exercise power over the party States. *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720-31 (1838). The Supreme Court's jurisdiction over cases against a state brought by the individual state or by the United States stems from the States' consent and delegation of authority in the Constitution, "a necessary feature of the formation of a more perfect Union . . . [and] inherent in the constitutional plan." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934). It is logical that if the "plan of the convention"[38] contemplates that suits between the States are within the judicial power of the United States, it contemplates that such suits are subject to the necessary adjuncts of that power.[39]

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38. THE FEDERALIST No. 81 (A. Hamilton).

39. As Mr. Justice Iredell, dissenting in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the decision which provoked passage of the Eleventh Amendment, *see Hans v. Louisiana*, 134 U.S. 1 (1890); C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 46-74 (1972), wrote:

> So far as States under the Constitution can be made legally liable to [federal judicial] authority, so far to be sure they are subordinate to the authority of the *United States*, and their individual sovereignty is in this respect limited. But it is limited no further than the necessary execution of such authority requires.

Id. at 436 (emphasis in original). The corollary of the latter negative limit is that the States' subordination to federal judicial authority *extends* to "the necessary execution of such authority."

In *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), the United States, on behalf of Indian tribes, filed a claim in bankruptcy; the debtor filed a cross-claim against the United States. The Court held that the cross-claim was barred by sovereign immunity, rea-

Thus, once a state is brought properly within federal jurisdiction—in this case by the bringing of suit by another State—the Court may hear at least certain claims against the state.[40] *Compare Department of Employment v. United States*, 385 U.S. 355, 358 (1966) (United States joined Red Cross as coplaintiff in suit for refund of state taxes on federal instrumentality; Eleventh Amendment not implicated) *with Principality of Monaco v. Mississippi*, 292 U.S. 313, 329-30 (1934)(suit against state by federal corporation barred by Eleventh Amendment) *and Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945)(taxpaper suit for refund from state officials barred by Eleventh Amendment); *cf. Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 73 (1927)("Though a sovereign, in many respects, the state when a party to litigation in this Court loses some of its character as such.") "[T]he proposition that the Eleventh Amendment, . . . control[s] a court of the United States in administering relief, although the court was acting in a

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soning that "[t]he desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity." *Id.* at 513. Since a cross-claim is ordinarily ancillary to the underlying suit, *see Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 375 n.18 (1978), the case casts some doubt on the conclusion that the federal courts may exercise ancillary jurisdiction over claims barred by sovereign immunity. But *United States Fidelity* concerned the United States' immunity governed solely by the legal rights accorded by the sovereign. *See Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). The Eleventh Amendment deals with the interaction of the States' immunity with the power of a higher sovereign. *See* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY, 150-74 (1972); Baker, *Federalism and the Eleventh Amendment*, 48 COLO. L. REV. 139, 147-75 (1977).

40. That the States are already brought within jurisdiction distinguishes *Missouri v. Fiske*, 290 U.S. 18 (1933), in which the Court held that the Eleventh Amendment prohibited bringing against a state an "ancillary and supplemental bill" to a proceeding already adjudicated in federal court. *Cf. Aldinger v. Howard*, 427 U.S. 1 (1976)(party cannot be joined solely on basis of pendent nonfederal claim).

matter ancillary to a decree rendered in a cause over which it had jurisdiction is not open for discussion." *Gunter v. Atlantic Coast Line Railroad*, 200 U.S. 273, 292 (1906). The Court has demonstrated a willingness to tolerate judgments which operate in some measure against states, but which to the extent they do so are incidental to cases not barred by the Eleventh Amendment. *See Hutto v. Finney*, 437 U.S. 678, 695-97 (1978)(attorney's fees paid by state); *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)("ancillary" effect on state treasury of prospective injunction against state official).

The sensitivity to the sovereignty of the States which the Eleventh Amendment reflects undoubtedly places limits on the reach of anciliary jurisdiction across the barrier of the amendment. Whatever those limits, this case—in which the Tribes' claims stem from those originally presented, parallel those now presented by the United States, and grow directly out of the Court's decrees—is within them. Where the Eleventh Amendment is raised as a bar to federal jurisdiction "the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). Here, where the claims which the Tribes seek to raise as intervenors are irrevocably entwined with the existing lawsuit, the "essential nature and effect of the proceeding" remains a suit between a state and sister states, and not a suit "commenced or prosecuted against one of the United States" by a party whose suit is barred by the Eleventh Amendment.

The moving parties raise similar considerations in arguing that Arizona, by bringing this suit in which the Indian claims are intimately bound up; Nevada, by intervening; and California, by consenting to the

United States' intervention on behalf of the Indians, have waived the protection of the Eleventh Amendment. A state may waive the Eleventh Amendment by voluntarily entering into litigation otherwise barred by the amendment. *Missouri v. Fiske*, 290 U.S. 18, 24-25 (1933); *Gunter v. Atlantic Coast Line Railroad*, 200 U.S. 273, 284 (1906); *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883). But where such a waiver has been found, it has been in litigation against parties who under the Eleventh Amendment could not themselves commence litigation against a state. This is not true of the acts which the moving parties suggest amounted to such a waiver in this case; because suits against a state by another state or the United States are not barred by Eleventh Amendment immunity, neither the original filing of suit or intervention against another state nor the intervention of the United States necessarily implicated the States' sovereign immunity. Assuming that this immunity is implicated by the Tribes' motions to intervene, it is difficult to infer that the States have consented to such intervention by voluntarily entering into litigation where their sovereign immunity was not implicated. To the extent that such an inference can be drawn, it is because the issues presented by the Tribes are ancillary to the underlying case.[41]

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41. The moving parties also argue that, because the Tribes seek no money or property judgment against the States but only a prospective equitable decree which, by its terms, would not run against the States and which would not require direct federal court interference in state interests, the suit in substance is not one brought "against" a state. Supplemental Memorandum for the United States on Preliminary Issues 16-23; Memorandum for the United States, *supra* note 13, at 11-14; Memorandum on Behalf of Colorado River Indian Tribes for the Special Master 18-19 (f d with Special Master, April 17, 1979); Brief of the Cocopah Indian Tribes, *supra* note 23, at 10-13. *Cf., e.g., Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 462-64 (1945); Ex Parte Young, 209 U.S. 123,

Eleventh Amendment immunity may also be set aside where Congress authorizes suit against a state pursuant to the States' surrender of sovereignty in delegating to Congress its constitutional powers. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-56 (1976); *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 282-285 (1973); *Parden v. Terminal Railway*, 377 U.S. 184, 190-92 (1964). This case presents the contention that 28 U.S.C. § 1362 is such a congressional abrogation of the States' immunity. Section 1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

In *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), the Supreme Court considered whether section 1362 confers jurisdiction over a suit by Indian tribes to enjoin collection of a state tax in the face of 28 U.S.C. § 1341, which prohibits district courts from enjoining the assessment, levy, or collection of a state tax where a plain, speedy, and efficient remedy is available in the

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155-56 (1908). This line of argument is inapposite. Analysis whether the relief sought makes a suit one against a state "in fact, though not in form, *In Re Ayers*, 123 U.S. 443, 489 (1887), stems from cases ostensibly brought against a state official, which may or may not be barred by the Eleventh Amendment depending on the substance of the suit, *see Ford Motor Co., supra*, 323 U.S. at 464. A suit against a state *eo nomine* is a suit "against" a state for Eleventh Amendment purposes, and, at least so long as a judgment will have some effect on the state named, is barred by the Eleventh Amendment. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978)(per curiam); *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 737, 846-59 (1824).

I do treat these factors as affecting the reach of ancillary jurisdiction in the context of the Eleventh Amendment, however.

state courts but excepts cases in which the United States is a plaintiff. The Court concluded that it does. Referring to language in the legislative history of section 1362 which characterizes the section as providing "the means whereby the tribes are assured of the same judicial determination where the action is brought in their behalf by the Government or by their own attorneys,"[42] the Court concluded "that Congress contemplated that a tribe's access to the federal courts to litigate a matter arising 'under the Constitution, laws, or treaties' would be at least in some respects as broad as that of the United States suing as the tribe's trustee." 425 U.S. at 473.

Since *Moe* was decided, two federal district courts have found that the congressional intention to provide Indian tribes with a capacity to sue as broad as that of the United States indicates intent to remove the States' Eleventh Amendment immunity in suits brought by the Indian tribes. *Confederated Tribes of the Colville Indian Reservation v. Washington*, 446 F. Supp. 1339, 1350 (E.D. Wash. 1978)(three judge court); *Aquilar v. Kleppe*, 424 F. Supp. 433, 436 (D.Alas. 1976)(dictum). Echoing and citing these cases, the moving parties urge the same conclusion in this case.[43] Prior to *Moe*, the prevailing interpretation of section 1362 was that it gave Indian tribes status equal to that of the United States as a litigant only where the United States might have brought suit as trustee for the Tribes, but declined to do so. *Standing Rock*

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42. H.R. Rep. No. 2040, 89th Cong. 2d Sess. 2-3 (1966), 1966 U.S. Code Cong. & Ad. News 3143, 3147.

43. Memorandum for the United States, *supra* note 13, at 14-16. Response of the Fort Mojave Tribe, *et al.*, to Issues Requested by the Master for San Francisco Hearing 6-7 (filed with Special Master April 13, 1979); Memorandum on Behalf of Colorado River Indian Tribes, *supra* note 41, at 17; Brief of the Cocopah Indian Tribe, *supra* note 23, at 8-9.

Sioux Indian Tribes v. Dorgan, 505 F.2d 1135, 1139-40 (8th Cir. 1974); *Fort Mojave Tribe v. LaFollette*, 478 F.2d 1016, 1018 (9th Cir. 1973); *Oneida Indian Nation v. County of Oneida*, 464 F.2d 916, 924 (Lumbard, J., dissenting), *rev'd on other grounds*, 414 U.S. 66 (1974); *Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Co.*, 353 F. Supp. 1098, 1100 (D. Ariz. 1972). The States, while they apparently do not contest that section 1362 allows Indian tribes to sue states in some cases, advance the formerly prevailing view and argue that this waiver of immunity applies only where the United States has failed to bring suit on behalf of the Indians. In addition, following the literal language of section 1362, they argue that the section applies only the actions originating in the district courts.[44]

If section 1362 abrogates the States' Eleventh Amendment immunity, it does so without requiring the United States' failure to sue as a predicate. Nowhere did the *Moe* Court or the three judge court below consider whether any action on the part of the United States had been sought or awaited before the Tribes in that case brought suit, nor does anything in the reported facts of the case indicate that any such effort was made. The report of the House Judiciary Committee on section 1362 does indicate that the section "would provide for U.S. District Court jurisdiction in those cases where the U.S. attorney declines to bring an action and the tribe elects to bring the action." H.R. REP. No. 2040, 89th Cong., 2d Sess. 2, 1966 U.S. CODE CONG. & AD. NEWS 3143, 3147. But in enacting section 1362, Congress acted against the background of the long line of authority which recognizes that the right of the United States to sue as trustee for

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44. Memorandum of the States of Arizona, California and Nevada, et al., *supra* note 11, at 4-5.

Indian tribes does not diminish the Indians' right to sue on their own behalf, *see Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 370 and cases cited at 370-374 (1968). It goes against this background to construe a provision enacted to provide Indian tribes with access to the federal courts through their own attorneys as conditioning this access. Such a construction is all the more strained in view of Congress' concomitant intent to permit tribal suits without regard to amount in controversy.[45] It is unlikely that Congress intended that every case, no matter the amount involved, await action by the United States before Indian tribes could take advantage of their expanded access. The language of the Judiciary Committee quoted above, then, appears to refer to the scope of the section and not its conditions.

There remains the question whether the congressional intent to provide Indian tribes with status as a litigant equal to that of the United States extends to waiving the States' immunity from suit and giving Indian tribes that status in suits against states. I conclude that it does.

Congressional abrogation of the States' Eleventh Amendment immunity depends on Congressional intent: "exercise of such power [will] not be presumed without clear evidence of congressional purpose." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 135 (1978). *See, e.g., Hutto v. Finney*, 437 U.S. 678, 698 n.31 (1978); *Employees v. Missouri Department of Public Health*, 411 U.S. 279, 283-85 (1973). Section 1362 itself does not expressly waive the States' immunity, and the legislative history does not directly address the issue. The conclusion that section 1362 abrogates the States' immunity flows logically from that much of the congres-

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45. *See* H.R. REP. No. 2040, *supra*, at 1-2, 1966 U.S. CODE CONG. & AD. NEWS at 3146-47.

sional intent as is clear, however. The House Judiciary Report refers to litigation which the United States may initiate as trustee for Indian tribes as "involving issues *identical* to those which will be presented in cases brought under the new section," and refers to the section as "the means whereby the tribes are *assured* of the same judicial determination . . ." as in cases brought by the United States as trustee. H.R.REP. No. 2040, *supra* at 2-3, 1966 U.S. CODE CONG. & AD. NEWS at 3147 (emphasis added). Nevertheless, intent to abrogate the Eleventh Amendment may be more easily inferred with respect to suits by Indian tribes than suits by individuals. Indian tribes historically have had a unique legal status and a "special relationship" with the United States which permits preferences granted to no other group. *See Morton v. Mancari*, 417 U.S. 535, 552-55 (1974); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 14-16 (1831). These factors in turn underlie a canon of construction which resolves the interpretation of federal statutes dealing with Indians in favor of the Indians. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174-75 (1973); *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968). Indian tribes also occupy a sovereign status comparable to that of the States, *Puyallup Tribe v. Washington Game Department*, 433 U.S. 165, 172-75 (1977); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-17 (1831), and which exists in partial contraposition to that of the States, *Puyallup Tribe, supra*, 433 U.S. at 172; *McClanahan, supra*, 411 U.S. at 168-73; *Williams v. Lee*, 358 U.S. 217, 218-23 (1959). The surrender of sovereignty imposed on the States by permitting suits by Indian tribes is thus less than by permitting individual suits. In general, the requirement of a clear congressional abrogation of the States' Eleventh Amendment immu-

nity insures that Congress has intended to impose on the States the burdens which result. *See Hutto, supra* 437 U.S. at 697 n.27. By comparison to suits by individuals, the impact authorizing suits by Indian tribes would have on the States, fiscal or otherwise, is slight. For these reasons, I conclude that Congress intended section 1362 to permit suits against the States by Indian tribes.

The contention that section 1362 authorizes such suits only when they originate in the federal district courts is disposed of by *Arizona v. California*, 439 U.S. 419 (1979). Rather than construe section 1362 as withdrawing the Supreme Court's original jurisdiction over cases in which a state is a party, I interpret the section as confining federal question claims by Indian tribes to the federal courts, but not to the federal district courts in particular. *See id.* at 436-37; *see also* H.R. REP. No. 2040, *supra* at 2-3, 1966 U.S. CODE CONG. & AD. NEWS at 1347.[46]

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46. The Two Tribes argue that the Colorado River Compact and the Boulder Canyon Project Act, 43 U.S.C. §§ 617 *et seq.*, also amount to a waiver of the States' immunity, because the Compact and the Act contemplate pervasive federal regulation of the Colorado River system, and because both were approved by the United States as well as the States involved in this litigation. Section 13 of the Act, 43 U.S.C. § 617 *l*(d) provides:

> The conditions and covenants referred to herein shall be deemed to run with the land and the right, interest, or privilege therein and water right, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing any such patent, grant, contract, concession, lease, permit, license, right of way, or other privilege from the United States or under its authority, or not, and shall be deemed to be for the benefit of and available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and users of water therein and thereunder, by way of suit, defense, or otherwise, *in any litigation respecting the waters of the Colorado River or its tributaries* (emphasis added).

Neither entry by a state into an interstate compact nor into an area of plenary federal regulation by itself amounts to a waiver by either Con-

II. Final Determination of Reservation Boundaries

A

The 1964 decree in paragraph II(D)(4) provided for the allocation of water for the benefit of the Colorado River Indian Reservation. Similarly, paragraph (5) provided for the allocation for the Fort Mojave Indian Reservation. The last clause of paragraph (5) contained the following language:

> [P]rovided that the quantities fixed in this paragraph and paragraph (4) shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

The 1979 degree specified that the latter provision is unaffected by the Court's determination of present perfected rights. 439 U.S. 419, 421. In addition, the January decree contained the following language similar to paragraph II(D)(5):

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gress or the state of Eleventh Amendment immunity. *See Parden v. Terminal Railway*, 377 U.S. 184, 192 (1964); *cf. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979)(some bistate agencies created by interstate compact have Eleventh Amendment immunity). The crucial question remains whether Congress or the States have intentionally waived that immunity.

Analysis of section 13(d) of the Boulder Canyon Project Act in light of the other provisions of section 13 indicates that the reference in the former to "any litigation respecting the waters of the Colorado River . . .," does not contemplate wide-open litigation involving all the parties mentioned, thus contemplating the possibility of suits by users of Colorado River water against the States mentioned. The purpose of section 13(d) is to give the States and state users of water the benefit of covenants which in the preceding subsections incorporate by reference the Colorado River Compact and are created between the United States and its privies. Without section 13(d), the covenants incorporating the Compact would be available only to the latter.

> the quantities fixed in paragraphs (1) through (5) of Art. II(D) of [the 1964] Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

Now, not only the Fort Mojave and Colorado River, but the other three Tribes as well, and the United States on behalf of all of them, seek an adjustment providing additional present perfected rights. They contend that boundary line changes since 1964 have increased the practicably irrigable acreage of their reservations. The Tribes and the United States rely on the present boundaries as fixed by orders of the Secretary of the Interior, certain court decisions and an act of Congress as satisfying the condition "in the event that the boundaries of the respective reservations are finally determined."

All the parties agree that the Court should now determine any additional present perfected rights. Although the 1964 decree acknowledged and expressly provided for boundary disputes only with respect to the Fort Mojave and Colorado River Indian Reservations, the additional proviso of the 1979 decree, issued after the Court was apprised of boundary disputes concerning the reservation, indicates that the amounts determined for all five reservations "shall continue" to be subject to adjustment. Thus, adjustments for boundary determinations affecting any of the reservations were explicitly provided for in the 1979 decree and impliedly contemplated in the 1964 decree "in the event that the boundaries of the respective reservations are finally determined."[47]

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47. In any event, Article IX, even most narrowly construed, would recognize the propriety of entertaining claims as to the Chemehuevi, Fort Yuma, and Cocopah Reservations paralleling those that can be raised as

The State parties concede that when the boundary lines have been finally determined, the Court should allot the water rights in proportion to the practicably irrigable acreage of additional boundary lands, and urge that the Court should now consider such an allotment.[48] They contend, however, that the boundaries have not been finally determined and that I should make a de novo determination of the boundaries for recommendation to the Court. The issue, then, is whether the Secretarial orders, court judgments, and Act of Congress relied on by the Tribes and the United States, are the sort of final determinations contemplated by the Court's decrees.

B

The parties are not in disagreement over the land areas involved in the boundary determinations at issue. They are here outlined as presented by the motion of the United States, and not disputed by the State parties,[49] or by the Indian Tribes.

(1) *Fort Mojave Reservation.*

Two boundary adjustments affect this reservation: (1) the restoration of that portion of the so-called Hay and Wood Reserve west of the Blout survey of 1928; and (2) the adjudication of a tract formerly claimed by the LaFollettes as properly part of the reservation.

(a) *The Hay and Wood Reserve.*

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to the Fort Mojave and Colorado River Reservations under Article II(D)(5). *See Wisconsin v. Illinois*, 388 U.S. 426 (1967), *modifying* 281 U.S. 696 (1939); *New Jersey v. New York*, 345 U.S. 369 (1953), modifying 283 U.S. 805 (1931). *Cf. Winters v. United States*, 207 U.S. 564 (1908).

48. Motion of the United States for Modification of Decree and Supporting Memorandum 17-23 (filed December 22, 1978).

49. Response of the States of Arizona, California, and Nevada, and Other California Defendants to the Motion of the United States for Modification of Decree 20-25 (filed February 14, 1979).

The Hay and Wood Reserve—once attached to the Camp Mojave Military Reservation for supplies of hay and wood and transferred with the camp in 1890 to the Department of the Interior for the benefit of the Tribe—constitutes the central western portion of the Fort Mojave Indian Reservation. The western boundary of this tract, the whole of which was described as containing some 9,000 acres,[50] was surveyed by Sidney Blout in 1928. The correctness of that survey was long disputed and was challenged by the United States in the original proceedings in this case. The Special Master made findings and conclusions of law accepting the Blout survey as determinative but the Court disapproved the Special Master's effort to determine disputed reservation boundaries, 373 U.S. at 601, and the question remained open. On June 3, 1974, the Secretary of the Interior, acting on the advice of the Solicitor of Interior reversing prior Solicitors, issued an order annulling the 1928 survey and restoring the former boundary for the Hay and Wood Reserve a little more than a mile westward. A new plat was prepared reflecting the order; it was protested by alleged patentees of land in the disputed area; these objections were overruled and the final plat was approved and filed on November 6, 1978. This plat added to the reservation some 3,500 acres not treated as part of the Fort Mojave Reservation when the water allocations were decreed in 1964. The United States alleges that this tract contains approximately 2,500 practicably irrigable acres; the Tribes allege 3,580 such acres, of which 1500 are presently being irrigated.

(b) *The LaFollette Tract.*

This tract is on the west side of the Fort Mojave Reservation, south of the Hay and Wood Reserve.

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50. The Special Master's Report of 1963 found it contained 9,114.81 acres, more or less.

Here the Tribe obtained a stipulated judgment in its favor against the assignees of a railroad patent grant, which had the effect of adding most of a section to the Reservation.[51] The United States estimates that the tract in question places an additional 500 irrigable acres within the adjusted reservation boundary.

(2) *Chemehuevi Reservation.*

The boundary change at this reservation adds some 2,430 acres along Lake Havasu. These were restored to the Chemehuevi Reservation by Secretarial Order of August 5, 1974, the result of a determination that part of the land taken from the reservation for the construction of Parker Dam was not needed. Although most of this land cannot be irrigated, both the government and the Tribe assert that some 150 practicably irrigable acres are included.

(3) *Colorado River Reservation.*

There are two boundary adjustments affecting this reservation. The first is the so-called "Benson Line" area, the other along the northwest boundary.

(a) *The Benson Line.*

At the time of the original hearings before the Special Master, doubt existed whether the central western boundary was the fluctuating channel of the Colorado River, or, a line meandered by W.F. Benson in 1879, now on the California side of the river. The Special Master undertook to resolve the question also, but the Court disapproved his attempt to fix the boundary, and the matter was left open. Subsequently, on January 17, 1969, the Secretary of the Interior formally adopted the Benson Line as the western boundary of the reservation along the entire segment covered by the Benson survey. The United States subsequently obtained final judgments in title disputes with private

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51. *Fort Mojave Tribe v. LaFollette,* Civ. No. 69-324MR (D.Ariz., February 7, 1977).

parties in the United States District Court for the Central District of California,[52] partially stipulated, quieting its title as trustee for the Tribes to separate parcels within this additional area. This Secretarial Order added some 4,439 acres to the reservation, of which approximately 3,010 the United States claims are practicably irrigable. The Colorado River Indian Tribe claims that 2,710 of these acres are irrigable.

(b) *The Northwest Boundary.*

During the investigation of the Benson Line problem, the Secretary discovered what he considered to be another surveying error. As a result of this discovery, the Secretary approved a corrected plat on December 18, 1978. This new plat moved one end of the northwest boundary to a point westward and added approximately 450 acres to the reservation from public lands of the United States. The United States claims 100 of these are practicably irrigable.

(4) *Fort Yuma Reservation.*

By order of December 20, 1978, the Secretary of the Interior resolved a long-standing dispute and determined that the original boundaries of this reservation as established in 1884 are the true boundaries. At the time of the original proceedings in this case, the boundaries were considered to contain only the area alloted by trust patents to members of the Tribe. This change added some 12,00 acres to the reservation. The United States claims 5,500 acres of irrigable lands within this added area.

(5) *Cocopah Reservation.*

The boundary of the West Cocopah Reservation has been adjusted by two occurrences since the 1964 court decree: (1) an area of accretion to the west of the old boundary; and (2) a tract added by an act of Congress to the south of the accreted lands.

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52. The opinions are unpublished.

(a) Substantial lands accreted to the western side of the reservation because of the gradual western movement of the Colorado River. The government relies on a final judgment entered May 12, 1975, for its claim that 883.53 acres have thus been added to the Reservation.[53] The United States and the Cocopah contend 780 acres of this are practicably irrigable.

(b) By Act of June 24, 1974, 88 Stat. 266, Congress extended the boundaries of the West Cocopah Reservation by adding a strip immediately below the accretions. This addition comprises 357.46 acres, of which approximately 332 are claimed by the United States to be practicably irrigable.

There is no dispute as to the total number of acres of land that would be added to the several reservations if the boundaries, outlined above, are accepted as finally determined for the purposes of the motion to adjust the Court's decree.

C

I conclude that the determinations that have been made with respect to the stated boundary changes may be accepted as final for the purpose of considering additional allocations of water rights to the reservations. The conclusion is limited to that specific purpose. I make no findings with respect to titles to the land involved, either as to private claimants or as to any other contestant over the correctness of the boundary lines. Nor do I consider that the acts of the Secretary or of the courts in private litigation are res judicata of the boundaries as to present litigants who were not parties to such proceedings. I consider only whether the acts of the Secretary, and the acts of the courts in

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53. *Cocopah Tribe v. Morton*, No. Civ-70-573-PHX-WEC (D.Ariz. May 12, 1975).

private litigation accepted by the Secretary fall within the sphere of finality to permit the parties to act on them until some interested party succeeds by a plenary action in vacating or setting aside such determinations. For present purposes, I believe that these acts provide the sort of finality contemplated by the Court when it left the boundary dispute concerning the reservations for later determination.

At the outset, it is important to bear in mind the role which the boundary determinations play in this case. This is a water rights case, not a land case. The acreage of the reservations is an issue because practicably irrigable acreage is made the measure of the reservations' water rights. In *Winters v. United States*, 207 U.S. 564 (1908), the Court established that the United States, when it creates an Indian reservation, impliedly reserves water for needs of the reservation, and that water rights established subsequent to those of the reservation give way to that of the reservation as its needs expand. The Court applied the *Winters* doctrine in its original opinion in this case, holding that at the time it created the five reservations at issue here, the United States reserved enough water "to satisfy the future as well as the present needs of the Indian Reservations." 373 U.S. at 600. The Court concluded, agreeing with the Special Master, "that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." *Id.* at 601. The Master's choice of irrigable acreage as a measure was based on the conclusion that it provided an estimate of the amount eventually needed to make the otherwise arid lands productive. The Indians' actual use of the water remains unrestricted. Practicably irrigable acreage, then, is a rough measuring stick, a tool toward an informed equitable estimate of the Indians' needs. To measure this device, in turn, it is nec-

essary to know the extent of the reservations, and to measure the latter, the boundaries. The boundaries are a reference point for an issue itself secondary to central concern of this case, water rights.

The model of the previous treatment of the boundary determinations by the Court itself much weakens the contention of the State parties. They say that I should now receive de novo evidence of the correct boundary lines and the claims of private individuals for a recommendation to the Court so that it would make a determination of the correct boundaries in this litigation. In the original litigation of this case, the Special Master received evidence touching on the boundaries of two of the reservations drawn in question before him. Upon its later adoption of most of his report, the Court disapproved of his attempt to adjudicate the boundary lines. The Court said:

> We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, then the dispute can be settled at that time.

373 U.S. at 601. Rather than resolve the boundary dispute then and there, the Court provided for an adjustment in water rights "in the event that the boundaries . . . are finally determined." 376 U.S. at 345. Except for the boundary disputes mentioned in the Court's opinion, all parties in the original litigation were dealing with boundaries set either by acts of Congress or by executive order. Whatever challenge might have been raised to these, no State party contested the right of the Court to accept as final and binding *for the pur-*

pose of that litigation such established boundaries. These all were deemed to be final for the purpose of the water allotments then presented to the Court.

The treatment of the boundary disputes suggests an intention similarly to adopt by reference determinations of the disputed boundaries. That it was "unnecessary" to determine those disputes "here" indicates that it was adequate to do so elsewhere. And rather than making some specific provision for the determination of the boundary disputes, *cf. Oklahoma v. Texas*, 256 U.S. 602, 605 (1921), the Court merely left its decree open to adjustment "in the event" the disputes were resolved. This conditional language belies any intent to settle the disputes. The language the Court used with respect to a potential dispute, while it concedes the possibility that the Court might be required to settle title disputes, seems clearly to indicate that any disputes with respect to secretarial action would be instituted by a party which was refused water, in other words, a party claiming title to the land, not one seeking a collateral determination of title.[54]

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54. This reference to the Secretary's "refusal" to deliver water to the disputed areas appears to have contemplated that the Secretary would have discretion to determine whether water should be delivered to the disputed lands. Such discretion is inconsistent with the ultimate decree, which based rights for the reservations based on irrigable acres without involving the disputed lands and enjoined the Secretary from delivering water except in accordance with these provisions. Instead the decree provided for an adjustment by agreement or decree.

While awarding the Secretary discretion to deliver additional water to the dipsuted areas would affirm the conclusion that boundary determinations by the Secretary should be accepted as final, limiting that discretion to instances where there is agreement among the parties does not affect the conclusion that the Court preferred that the boundaries of the reservations be settled elsewhere.

It is evident that the Court, in the sparing exercise of its original jurisdiction, contemplated that the boundaries of the reservations would be

Secretarial orders and judicial adjudications of title are appropriate determinations for adoption by reference in this litigation as a measuring stick for determining additional irrigable acreage. In large part, we are concerned with actions by the Secretary of Interior[55] concerning lines surveyed between the public lands of the United States and Indian reservations whose concern is a matter of the highest priority to the United States. The United States, in the exercise of its plenary power to regulate Indian affairs,[56] may establish Indian reservations by executive order. *Arizona v. California*, 373 U.S. 546, 598 (1963).[57] In the administration of public lands, the United States may survey, resurvey, and adjust its surveys. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 16-17 (1935); *Cragin v. Powell*, 128 U.S. 691, 698-700 (1888). Where such adjustment and resurveys affect private rights, they may be challenged and corrected by court action to quiet title. *United States v. State Investment Co.*, 264 U.S. 206, 212 (1924). These are precisely the sorts of determinations and proceedings which have occurred in this case.

Neither the power of the Secretary or of the courts to make boundary determinations nor the Court's intent to have these determinations made by such decisionmakers, if possible, is diminished by the State parties' contention that they did not have their "day in

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determined elsewhere, and such determinations relied on for the purposes of allocating water rights.

55. No contention is raised that the Act of Congress, 88 Stat. 266, extending the boundary of the Cocopah reservation, is subject to redetermination.

56. *See, e.g., McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 168-69 (1973); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886).

57. In *Arizona v. California*, the Court counted the creation of the Chemehuevi reservation by the Secretary of the Interior as the creation of a reservation by Executive Order. 373 U.S. at 596 n.100.

court" before these decisionmakers. I am aware of no claim to land in any of the disputed areas by any of the State parties. Their interest lies only to the extent that if some other party—or they themselves as aggrieved persons or intervenors in proceedings elsewhere now pending or commenced—should successfully contest the boundaries as now fixed by Secretarial Order, the allotments of water now sought on behalf of the Tribes would be reduced. This concern can be met by the inclusion in the final decree of the Court of a provision that would reduce the allotment now sought on behalf of the Tribes *pro tanto* for lands found to be practicably irrigable which subsequent litigation determined not to be within the boundaries of the respective reservations. This is the same procedure which the Court adopted to provide for land adjacent to the Fort Yuma Reservation and determined to have been conveyed to California and to the Southern Pacific Railroad. *See* 376 U.S. at 345.

In sum, I agree with the position put forward by the United States:

> It would be wholly arbitrary to consider the Reservation boundaries as they were understood in 1964 to be sufficiently "determined" to support a specific water allocation calculated on acreage—albeit no court judgment has ever vindicated the survey—but to deny comparable affect [sic] to subsequent dependent surveys of the boundaries because no court had approved them.

Motion of the United States, *supra* note 48, at 137-41. I also agree with the State parties that adjustments in tribal water rights should be considered now rather than await piecemeal litigation, so that some stability and predictability in the allocation of water rights can

be reached. *See* Response of the States, *supra* note 49, at 20-21.

Subject, therefore, to a proviso which would reduce the allocations which I eventually recommend on account of the enlarged boundaries on the basis of any valid court decisions withdrawing any lands from the reservations as now defined, I shall accept the boundary changes set forth in the motion by the United States filed on December 22, 1978 as having been finally determined within the meaning of the Court's 1964 decree and supplement.

III. Omitted Lands.

As I have already noted above, I shall permit the introduction of evidence by the United States and the Tribes as to any lands which they contend were omitted from the practicably irrigable lands within the 1964 boundaries. I shall thereafter decide whether and to what extent it is appropriate for me to consider such claims.

Respectfully submitted,

Elbert P. Tuttle
Special Master

Atlanta, Georgia
August 28, 1979

Elbert P. Tuttle

MOTION FILED
NOV 21 1979

IN THE

Supreme Court of the United States

October Term, 1979
No. 8, Original

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Motion of the States of Arizona, California, and Nevada and the Other California Defendants for Leave to File Exceptions to the Memorandum and Report of Special Master Elbert P. Tuttle and for Stay Order; Exceptions; and Opening Brief of Said Parties in Support of Their Motion and Exceptions.

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SUBJECT INDEX

Page

Opening Brief in Support of Motion and Exceptions 1

Argument 1

I

Special Master Tuttle's August 28, 1979 Order Permitting Relitigation of Practicably Irrigable Acreage Within the Reservation Boundaries as Recognized in the 1964 Decree Violates the Policies Underlying the Doctrines of Res Judicata and Collateral Estoppel and Severely Harms the State Parties 1

A. Introduction 1

B. Claims of the Tribes to Water in the Mainstream of the Colorado River Were Asserted by the United States, Fully Tried by Special Master Rifkind and Finally Determined by This Court 3

C. Public Policy Considerations Behind the Doctrines of Res Judicata and Collateral Estoppel Should Preclude Relitigation of Practicably Irrigable Acreage 5

D. Article IX of the Court's 1964 Decree Does Not Authorize Relitigation of Practicably Irrigable Acreage Within the 1964 Boundaries 7

Page

E. No Proper Equitable Basis for Special Master Tuttle's Order Permitting Relitigation, in Disregard of the Doctrines of Res Judicata and Collateral Estoppel, Was Presented and Said Order Will Result in Grievous Harm to the State Parties 9

II

Special Master Tuttle, in Accepting the Disputed Reservation Boundaries Urged by the United States and Proceeding to Try the Issue of Practicably Irrigable Acreage Within the Added Lands for Purposes of Increasing the Water Allocations for the Reservations, Is Acting Contrary to the Court's 1964 Decree Allowing Adjustment of Water Allocations Only When the Disputed Boundaries Have Been Finally Determined 15

A. Introduction 15

B. Significance of the Disputed Reservation Boundaries Issue 17

C. Interpretation of the Court's Intent in Providing for Adjustment of Reservation Water Allocations 20

(1) Orders of the Secretary of the Interior 21

(2) Federal Court Cases Involving Reservation Boundaries 24

D. Reasoning of the Special Master in Support of His Ruling 27

Page

E. Standing of the State Parties to Challenge the Secretary's Determinations of Disputed Boundaries in Other Proceedings 33

III

The Special Master Erred in Ruling That the Five Indian Tribes Be Permitted to Intervene and Be Represented by Independent Counsel .. 36

A. Introduction 36

B. Applicability of Sovereignty Immunity 37

(1) Interventions Sought Would Constitute Suits Against the Three States .. 38

(2) State Immunity Is Implicated Notwithstanding This Court's Ancillary Jurisdiction to Hear Additional Indian Tribe Water Claims 39

(3) State Immunity Is Not Abrogated by 28 U.S.C. 1362 as Applied to This Case 40

C. Federal Rule 24 Requirements 43

D. The "Compelling Interest" Test 46

E. Previous Denial of Navajo Tribe Motion to Intervene 50

Conclusion 52

TABLE OF AUTHORITIES CITED

Cases	Page
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	33
Aguilar v. Kleppe, 424 F.Supp. 433 (DC, Alaska, 1976)	42
Anselmo v. Harden, 253 F.2d 165 (3rd Cir. 1958)	10
Baltimore S. S. Co. v. Phillips, 274 U.S. 316 (1927)	6
Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892 (1942)	25
Bruszewski v. United States, 181 F.2d 419 (3rd Cir. 1950), cert. den. 340 U.S. 865 (1950)	25
Chicago v. United States, 396 U.S. 162 (1969)	33
Citizens Ass'n. of Georgetown, Inc. v. Zoning Com'n. of D.C., 477 F.2d 402 (D.C. Cir. 1973)	33
Cocopah Tribe of Indians v. Rogers, 70-573-PHX-WEC (1975)	26
Commissioner v. Sunnen, 333 U.S. 591 (1948)	6
Confederated Tribes of the Colville Indian Reservation v. State of Washington, 446 F.Supp. 1339 (EDC, Wash., 1978)	42
Davis v. McKinnon & Mooney, 266 F.2d 870 (6th Cir., 1959)	6
Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973)	41
Filice v. United States, 271 F.2d 782 (9th Cir. 1959), cert. den. 362 U.S. 924 (1960)	10
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)	41

Page

Ford Motor Co. v. Treasury Department, 323 U.S. 59 (1945) 38

Fort Mojave Tribe v. LaFollette, 478 F.2d 1016 (9th Cir. 1973) 42

Fiske v. Buder, 125 F.2d 841 (8th Cir. 1942) 10

Gordon & Co. v. Board of Governors of Fed. Reserve Sys., 317 F.Supp. 1045 (D. Mass. 1970) 33

Gratiot County State Bank v. Johnson, 249 U.S. 247 (1919) 26

Graves v. Associated Transport, Inc., 344 F.2d 894 (4th Cir. 1965) 25

Greene v. General Foods Corporation, 517 F.2d 635 (5th Cir. 1975) 26

Hale v. Finch, 104 U.S. 261 (1881) 26

Heckman v. United States, 224 U.S. 413 (1912) 40, 47

Heiser v. Woodruff, 327 U.S. 726 (1946) 6

Jeffords v. Young, 98 Cal.App. 400, 277 P. 163 (1929) 10

McIntosh v. Wiggins, 123 F.2d 316 (8th Cir. 1941), cert. den. 315 U.S. 831 (1942) 10

Moe v. Confederated Salish and Kootenai Tribes, etc., 425 U.S. 463 (1976) 41, 42, 43

Morris v. Jones, 329 U.S. 545 (1947) 6

Natural Gas Pipeline Co. v. Federal Power Commission, 128 F.2d 481 (7th Cir. 1942) 40

New Jersey v. New York, 345 U.S. 369 (1953) 46, 47, 48, 49

Page

New Orleans v. Gaines, 138 U.S. 595 (1890) 10

Oklahoma v. Texas, 258 U.S. 574 (1922) 40

Parden v. Terminal Railroad Co., 377 U.S. 184 (1964) 41

Partmar Corp. v. Paramount Theatres Corp., 347 U.S. 89 (1954), reh. den. 347 U.S. 931 (1954).. 9

Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1978) 42

Southern Pacific R.R. Co. v. United States, 168 U.S. 1 (1897) 6

Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135 (8th Cir. 1974) 42

Stovall v. Banks, 77 U.S. 583 (1870) 7

Sutphin v. Speik, 15 Cal.2d 195, 99 P.2d 652 (1940) 6

United States v. Alpine Land and Reservoir Company, 431 F.2d 763 (9th Cir. 1970) 48

United States v. Brigham Young University, 73-3058-DWW (U.S. D.C., 1976) 26

United States v. Curtis, 72-1624-DWW (U.S. D.C., 1977) 26

United States v. Denham, 73-495-ALS (U.S. D.C., 1975) 26

United States v. Nevada, 412 U.S. 534 (1973) 47

Utah v. United States, 394 U.S. 89 (1969) 49

Winters v. United States, 207 U.S. 564 (1908) 3, 18, 27, 31

Rules

Page

Federal Rules of Civil Procedure, Rule 24 ..... 36, 37, 43, 44, 46

Federal Rules of Civil Procedure, Rule 24(a) 44

Federal Rules of Civil Procedure, Rule 24(b) 45

Supreme Court Rules, Rule 9 43

Supreme Court Rules, Rule 9, Sec. 2 ..... 43, 44

Statutes

United States Code, Title 5, Sec. 702 33

United States Code, Title 28, Sec. 1362 ..... 38, 40, 41, 42, 43

United States Code, Title 28, Sec. 1505 15

United States Constitution, Eleventh Amendment.... 41, 51

Textbook

1B Moore, Federal Practice, Sec. 0.405[1], p. 624.. 6

IN THE

Supreme Court of the United States

October Term, 1979
No. 8, Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, *et al.*

Motion for Leave to File Exceptions to the Memorandum and Report of the Special Master and for a Stay Order.

The States of Arizona, California, and Nevada and the Other California Defendants (hereinafter referred to as "State Parties") move the Court for leave to file Exceptions to the Memorandum and Report on Preliminary Issues of Special Master Elbert P. Tuttle.

The Exceptions are based on the grounds, to be developed in our opening brief, that the determinations of the Special Master are erroneous and contrary to the law.

We recognize that in the normal course any exceptions to rulings of the Special Master would be filed after he has acted on all issues relating to intervention and tribal claims to additional water. Nevertheless, after the most careful consideration, we have concluded that implementation of the Special Master's preliminary rulings would cause irreparable prejudice to the interests

of the State Parties and that we cannot afford to postpone review by this Court until after the Special Master holds a full trial on the merits of the tribal claims. By letter of November 7, 1979 from the Special Master, we are advised that the final hearing on the merits is set for May 26, 1980; hence a stay order is necessary pending the Court's ruling on this motion and Exceptions.

Statement of Exceptions.

The States of Arizona, California, and Nevada and the Other California Defendants except to the Memorandum and Report of the Special Master, dated August 28, 1979, upon the following grounds:

I

Exceptions Relating to Permitting the Introduction of Evidence of Practicably Irrigable Acreage by the United States and the Five Indian Tribes* as to So-Called Omitted Lands (Memorandum and Report, at p. 41).

A. The Issue.

Whether Article IX of the Court's 1964 Decree in this case and the doctrines of *res judicata* and collateral estoppel permit the relitigation of practicably irrigable acreage within the recognized 1964 boundaries?

B. The Determination to Which Exception Is Taken.

The Special Master erroneously concludes:

Evidence may be introduced by the United States and the Tribes as to any reservation lands which

*The Five Tribes seeking intervention are the Chemehuevi, Cocopah, Colorado River, Fort Mojave, and Quechan Tribe of the Fort Yuma Indian Reservation.

they contend were omitted from the determination of practicably irrigable lands within the 1964 boundaries; and that he need not rule on the State Parties' opposition to so proceeding.

C. The Correct Conclusions.

The Special Master should have concluded:

1. The Court intended Article IX to reserve jurisdiction only over matters not finally determined and that it did, in Article II of the Decree, finally adjudicate irrigable acreage within the 1964 boundaries, as recommended by the previous Special Master. Such final adjudication is not subject to the Court's continuing jurisdiction under Article IX.

2. Relitigation of practicably irrigable acreage within the 1964 boundaries is precluded by the public policy considerations behind the doctrines of *res judicata* and collateral estoppel.

II

Exceptions Relating to the Final Determination of Reservation Boundaries Within the Meaning of Article II(D)(5) of the March 9, 1964 Decree (Memorandum and Report, at pp. 31-41).

A. The Issue.

Whether the boundaries of the respective Indian reservations have been finally determined within the meaning of Article II(D)(5) of the March 9, 1964 Decree, permitting adjustment by this Court of the reservation water allocations?

B. The Determinations to Which Exception Is Taken.

The Special Master erroneously concludes:

The boundaries of the Indian Tribes have been finally determined by Act of Congress, by final judgment

of a court of the United States or by "final" action of the Department of the Interior and said determinations may be accepted as final for the purpose of considering additional allocations of water rights to the reservations.

C. The Correct Conclusions.

The Special Master should have concluded:

The orders of the Secretary of the Interior and the judgments in the federal court cases are not final determinations of reservation boundaries for purposes of establishing water rights. The Secretarial orders relied on by the Tribes are functional for Department of the Interior administrative purposes, but cannot be considered final for the purpose of establishing claims for federally reserved water rights. The federal court judgments do not have *res judicata* effect on the rights of the State Parties who were not parties to the actions nor in privity with any party.

III

Exceptions Relating to the Sovereign Immunity of the States Under the Eleventh Amendment (Memorandum and Report, at pp. 16-30).

A. The Issue.

Whether the Eleventh Amendment bars intervention in this suit by the Indian Tribes without the consent of the States of Arizona, California, and Nevada?

B. The Determinations to Which Exception Is Taken.

The Special Master erroneously concludes:

1. That the States' Eleventh Amendment immunity is not implicated by the Tribes' motions to intervene because their claims as intervenors are ancillary to

a case or controversy between a state and sister states and between the United States and states.

2. Assuming the Eleventh Amendment immunity is implicated, 28 USC 1362 abrogated that immunity as regards suits by Indian tribes.

C. The Correct Conclusions.

The Special Master should have concluded:

1. States of the Union are immune from suit by Indian tribes in federal court without their consent except where that immunity has been surrendered through the adoption of the Constitution of the United States as implemented by Congressional enactment. 28 USC 1362 does not constitute such a surrender, as applied to this case, because it only allows suits by Indian tribes in instances where the United States could have sued on their behalf but failed to do so.

2. By seeking to establish additional claims adverse to the three States, the intervention sought by the five Indian Tribes would constitute a suit against each State. The fact that the tribal claims have already been asserted before the Special Master by the United States does not deprive the three States of their Eleventh Amendment right not to be sued by the Tribes also asserting those claims.

IV

Exceptions Relating to the Tribes' Motions to Intervene Despite Participation of the United States on Their Behalf (Memorandum and Report, at pp. 6-16).

A. The Issue.

Whether the five Indian Tribes meet the requirements for intervention in a case before this Court? And whether such intervention supplants the appearance of the United States on behalf of the Tribes?

B. The Determinations to Which Exception Is Taken.

The Special Master erroneously concludes:

1. The Tribes should be permitted to unconditionally intervene to assert their own pecuniary interests since those interests will be determined by the litigation.

2. Representation of the Tribes' interests by the United States may be inadequate.

3. The Tribes' intervention does not preclude continued appearance by the United States. Representation of the Tribes' interests by both the Tribes themselves and the United States will not prejudice the State Parties by causing duplication, delay, and confusion.

C. The Correct Conclusions.

The Special Master should have concluded:

1. No conflict of interest exists on the part of the United States which would prevent adequate representation of the Tribes. The United States has always vigorously asserted the Indian position and there is no reason to doubt that the United States will forcefully assert additional Indian Tribe water rights claims under Articles II(D)(5) and IX of the 1964 Decree. Therefore, the Tribes have not satisfied the inadequacy of representation requirement for intervention of right under Federal Rule 24(a) and in addition have not shown a compelling interest such as to justify intervention.

2. The Tribes may not be simultaneously represented by their own private counsel and by the United States. Multiple legal representation of the Tribes' interest would cause undue delay and prejudice to the State Parties and preclude permissive intervention under Federal Rule 24(b).

WHEREFORE, the State Parties request that the Court rule on these Exceptions to the Memorandum and Report of Special Master Tuttle at this time, that the Court decide this cause in the manner indicated above, that the Court stay further proceedings before the Special Master pending disposition of this motion and the exceptions, and that the Court issue such further orders as it deems proper.

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IN THE

Supreme Court of the United States

October Term, 1979
No. 8, Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, *et al.*

Opening Brief in Support of Motion and Exceptions

ARGUMENT

I

SPECIAL MASTER TUTTLE'S AUGUST 28, 1979 ORDER PERMITTING RELITIGATION OF PRACTICABLY IRRIGABLE ACREAGE WITHIN THE RESERVATION BOUNDARIES AS RECOGNIZED IN THE 1964 DECREE VIOLATES THE POLICIES UNDERLYING THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL AND SEVERELY HARMS THE STATE PARTIES

A. Introduction

As part of the 1956-1958 proceedings before the previous Special Master appointed by the Court in this case, the issue of practicably irrigable acreage within the Indian reservations was tried and findings were made by the Master and adopted by the Court. Nevertheless, the United States twenty years later claims certain reservation lands having practicably irrigable

acreage were not included in its presentation to the Special Master and that it should now be permitted to make such a showing and be awarded additional water entitlements based thereon. (Motion of the United States for Modification of Decree, dated December 21, 1978, at pp. 23-30, hereinafter referred to as "U.S. Motion".) The State Parties have responded that such a course would contradict applicable doctrines of *res judicata* and collateral estoppel, would be inconsistent with the 1964 Decree of the Court allocating water for the reservations, and would open up for costly retrial the entire subject of practicably irrigable acreage of the five Indian reservations because no findings were made identifying the practicably irrigable acreage of each reservation. (Response of the States of Arizona, California and Nevada and the Other California Defendants to the Motion of the United States for Modification of Decree, dated February 14, 1979, at pp. 4-10.)

Nevertheless, Special Master Tuttle by his August 28, 1979 Memorandum and Report on Preliminary Issues (p. 41) (hereinafter referred to as "Memorandum and Report") has ruled that he will hear evidence of practicably irrigable acreage on so-called "omitted lands" and will reserve ruling on the arguments in opposition to such relitigation asserted by the State Parties. In so proceeding, the Special Master is subjecting the State Parties, as well as the United States and the five Tribes, to great expense of trial preparation and presentation which, we submit, will be utterly wasteful in view of the legal arguments urged in bar of relitigating issues that have been tried previously. In effect, the Special Master is not reserving an evidentiary ruling, which is not uncommon, but rather a ruling on whether a cause of action is stated, and requiring

the parties to proceed to trial after which he will determine whether a cause of action was pleaded. Such a course defies reason as well as well-established judicial procedure.

B. Claims of the Tribes to Water in the Mainstream of the Colorado River Were Asserted by the United States, Fully Tried by Special Master Rifkind and Finally Determined by this Court

The United States, on behalf of the five Indian Tribes, asserted rights to water in the mainstream of the Colorado River before Special Master Rifkind. The United States relying on *Winters v. United States*, 207 U.S. 564 (1908), claimed it had the power to create a water right appurtenant to the lands of an Indian reservation without complying with state law. Special Master Rifkind concluded that the United States, when it created the Indian reservations along the lower Colorado River, intended to reserve for them the waters without which their lands would have been useless. The Special Master found that the magnitude of this reserved water right was measured by the amount of practicably irrigable acreage within the reservations and not by the number of Indians inhabiting them. Thus, Special Master Rifkind accepted the claim of the United States and awarded water rights in quantities sufficient to irrigate *all* the practicably irrigable acreage in each of the reservations. (Report of Special Master, December 1960, pp. 254-287.)

The Court accepted the Master's conclusion as to the quantity of water intended to be reserved. [See, Opinion of the Court, 373 U.S. 546 at 600 (1963).] The Court concluded, as did Special Master Rifkind,

that the only feasible and fair method by which reserved water for the reservations could be measured was practicably irrigable acreage. The various amounts of practicably irrigable land which the Master found to be on the different reservations was found to be reasonable by the Court. (Opinion of the Court, *supra* at 601.)

Thus, the issue of the amount of practicably irrigable acreage within the boundaries recognized in the 1964 Decree of all five Indian reservations was fully tried by Special Master Rifkind. Substantial evidence, including expert testimony, maps, and soil surveys, was presented by the parties during the lengthy proceedings on this issue. At the time the original decision was made by the Department of Justice lawyers and their experts as to the practicably irrigable acreage, there were ample data on soils, the location of then-existing irrigation facilities, and the economic feasibility of extending those facilities. (See, Transcript of the Proceedings before Special Master Rifkind, pp. 12,984 *et seq.;* and 14,119 *et seq.*) The United States' present contention that reservation lands were "omitted" from practicably irrigable acreage consideration is an attempt to relitigate the issue of practicably irrigable acreage some 20 years after the trial before Special Master Rifkind on that issue and is therefore untenable.

Indeed, the lands in question were not overlooked by the United States in the earlier proceedings. All the lands within the conceded boundaries were fully considered and taken into account by the United States' attorneys and their experts, and those determined not to be practicably irrigable were consciously excluded from any water allocation claim, and the parties, Special Master, and the Court were all so advised in the

course of the trial proceedings.[1] Thus, the lands in question are more properly referred to as "lands deemed nonirrigable."

C. Public Policy Considerations Behind the Doctrines of Res Judicata and Collateral Estoppel Should Preclude Relitigation of Practicably Irrigable Acreage

The doctrine of *res judicta* is a judicially created doctrine, which exists as a rule of reason, justice, fairness, expediency, practical necessity, and public tranquility. The doctrine is based on the worthy premise that the interest of the proper administration of justice is best served by limiting parties to one fair trial of an issue. It is a fundamental principle of jurisprudence that material facts or questions which were directly in issue in a former action, and were judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties or their privies,

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[1]On January 7, 1958, the following interchange took place between David Warner (attorney heading Department of Justice legal team during the trial) and Special Master, Simon Rifkind:

THE MASTER: ". . . The question is whether the maps constitute the definition of what you regard as irrigable . . ."

MR. WARNER: "Well, Your Honor, that is how we are defining 'irrigable' for the purpose of proving the claim that is being asserted."

THE MASTER: "And although there may be other irrigable lands within those reservations, those you do not lay any claim for the service of water upon?"

MR. WARNER: "That is correct."

THE MASTER: "All right. That is what we know, and that is the way we are going to be bound. This is a statement that I will take seriously."

(See Transcript of the Proceedings before Special Master Rifkind, pp. 14,155).

regardless of the form that the issue may take in the subsequent action. [See, *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Morris v. Jones*, 329 U.S. 545 (1947); *Heiser v. Woodruff*, 327 U.S. 726 (1946); *Baltimore S. S. Co. v. Phillips*, 274 U.S. 316 (1927); *Davis v. McKinnon & Mooney*, 266 F.2d 870 (6th Cir., 1959); and Moore, *Federal Practice*, Vol. 1B, p. 624, Section 0.405 [1].]

The rule of collateral estoppel provides that where two actions are on different causes of action, the earlier judgment is conclusive, not only as to issues actually determined in the prior action, but also as to other matters which were necessary to the decision. [See, *Southern Pacific R.R. Co. v. United States*, 168 U.S. 1 (1897); *Sutphin v. Speik*, 15 Cal.2d 195, 99 P.2d 652 (1940).]

Special Master Tuttle's order permitting introduction of evidence as to any land which the United States now contends was omitted from the earlier presentation of practicably irrigable lands within the 1964 boundaries violates the spirit and principle of the doctrines of *res judicata* and collateral estoppel, and results in irrevocable injury to the State Parties. The introduction of evidence by the United States for the purpose of recalculating practicably irrigable acreage on alleged omitted lands will subject the State Parties to uncertainty and confusion in legal relations that were defined in the 1964 Decree, harassment and vexation resulting from a second lawsuit on the same issues, and irretrievable economic expense entailed in pretrial and trial preparation required to refute the asserted claims for additional allocations of water.

D. Article IX of the Court's 1964 Decree Does Not Authorize Relitigation of Practicably Irrigable Acreage Within the 1964 Boundaries

The United States' attempt to relitigate practicably irrigable acreage within the 1964 boundaries in the original lawsuit under Article IX of the 1964 Decree is a procedural ploy designed to circumvent the doctrines of *res judicata* and collateral estoppel. As the above authorities indicate, these doctrines would clearly bar any such attempt made in a separate lawsuit. They should also apply here under the rule that a judgment may be final even though a party is given leave to apply to the trial court for its modification. *Stovall v. Banks,* 77 U.S. 583 (1870). The attempt at relitigation of issues in the context of the original suit is no more warranted than it would be in a new suit.

The United States has attempted to justify the motion procedure in the original case with the language of Article IX of the 1964 Decree. Article IX does not permit the parties to change the final, adjudicated portions of the Decree. Adopting the United States' interpretation of Article IX would result in interminable litigation between the parties. Article IX does, however, serve a legitimate purpose; it reserves jurisdiction to the Court to adjudicate matters that have not been finally determined. The calculation of practicably irrigable acreage within the undisputed reservation boundaries was finally determined and set forth in Article II of the 1964 Decree and is therefore not subject to the Court's continuing jurisdiction under Article IX.

The above conclusion is amply supported in the Report of Special Master Rifkind. The Special Master advocated a *finite* decree, as opposed to an open-ended decree, that would establish a water right for

each of the five reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the reservation and to satisfy related stock and domestic users. (Special Master's Report, December 1960, pp. 263-265.) A finite determination of reservation water rights was considered necessary by the Special Master so that in time of shortage the Secretary of the Interior would know how much water to release to satisfy his delivery obligations according to priority. (Report of Special Master, December 1960, pp. 255-256.) The Special Master emphasized his concern:

> "This will preserve the full extent of the water rights created by the United States and will establish water rights of *fixed magnitude* and priority *so as to provide certainty* for both the United States and non-Indian users." (Emphasis added.) (Report of Special Master, December 1960, p. 265.)

In his same report, the Special Master recommended adoption of a decree containing the identical Article IX which the United States now relies upon in arguing that recalculation of practicably irrigable acreage is permitted and that water rights have not been fully determined for the 1964 boundaries. (Report of Special Master, December 1960, p. 360.) Surely the Special Master did not attach such a meaning to Article IX, nor did the Court. Referring to claims of the United States, the Court stated:

> "While the Master passed upon some of these claims, he declined to reach others, particularly those relating to tributaries. We approve his decision as to which claims required adjudication, and likewise *we approve the decree he recommended for the government claims he did decide.*"

(Emphasis added.) (Opinion of the Court, *supra* at 595.)

The Court also adopted the same Article IX proposed by the Special Master. [Decree of the Court, 376 U.S. 341, 353 (1964).]

The State Parties contend that this Court intended Article IX to reserve jurisdiction only over matters not finally determined and that it did, in Article II of the Decree, finally adjudicate irrigable acreage within the 1964 boundaries, as recommended by the Special Master. Such adjudication is not subject to the Court's continuing jurisdiction under Article IX.

E. No Proper Equitable Basis for Special Master Tuttle's Order Permitting Relitigation, in Disregard of the Doctrines of Res Judicata and Collateral Estoppel, Was Presented and Said Order Will Result in Grievous Harm to the State Parties

Assuming *arguendo* that certain lands, as the United States asserts, were in fact omitted from practicably irrigable acreage calculation before Special Master Rifkind, the doctrine of *res judicata* makes a final, valid judgment conclusive on the parties, and those in privity with them, as to all matters, fact and law, that were or should have been adjudicated in the proceeding. Thus, the doctrine of *res judicata* precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which could properly have been raised and determined therein. See, *Partmar Corp. v. Paramount Theatres Corp.*, 347 U.S. 89 (1954), reh. den. 347 U.S. 931 (1954). A

valid judgment is the final judicial settlement regardless of whether all the grounds of recovery available have been put forward and even though the parties may have lacked knowledge of their complete legal rights therein. See, *Anselmo v. Harden,* 253 F.2d 165 (3rd Cir. 1958); *McIntosh v. Wiggins,* 123 F.2d 316 (8th Cir. 1941), cert. den. 315 U.S. 831 (1942); *Filice v. United States,* 271 F.2d 782 (9th Cir. 1959), cert. den. 362 U.S. 924 (1960).

In disregard of the doctrines of *res judicata* and collateral estoppel, Special Master Tuttle has deferred his ruling on the appropriateness of the "omitted land" claims. Permitting relitigation of this issue will subject the State Parties to just those inequities sought to be prevented by the doctrines of *res judicata* and collateral estoppel.

The State Parties recognize that the principles of *res judicata* and collateral estoppel may not be invoked to sustain a judgment procured by fraud and collusion. [See, *New Orleans v. Gaines,* 138 U.S. 595 (1890); *Fiske v. Buder,* 125 F.2d 841 (8th Cir. 1942); *Jeffords v. Young,* 98 Cal.App. 400, 277 P. 163 (1929).] A court may grant appropriate equitable relief from a judgment that is procured by fraud and collusion. Not having produced evidence that the 1963 judgment in this case was procured by fraud or collusion, the Tribes are not entitled to such exercise of the Court's equitable power.

The potential grievous impact of the repetitious litigation on the legally protected interests of the State Parties is magnified due to the finite quantity of Colorado River water. Pursuant to a body of law applied to the Colorado River, which has evolved out of a combination of federal statutes, interstate compacts,

court decisions and decrees, contracts with the United States, and an international treaty, its limited water has been completely allocated. Therefore, every additional acre-foot of water claimed by an Indian tribe means potentially one acre-foot less for one of the State Parties. In addition to the enormous sums of money at stake to replace loss of water supply, there is a real possibility that alternative sources of water may not be available to those State Parties whose rights are diminished.

The potential grievous impact on the State Parties resulting from recalculation of practicably irrigable acreage is well represented by the special interests of The Metropolitan Water District of Southern California and the State of Arizona. Because of Metropolitan's priority position in the 1931 intrastate Seven-Party Water Agreement (See, *the Hoover Dam Documents,* Wilbur and Ely (1948), Appendix 1003), establishing priorities of delivery among California agencies, increased Indian entitlements to Colorado River water will potentially reduce Metropolitan's entitlement. In addition, Metropolitan will be affected by the shortage in yield of the California State Water Project in the late 1980s just when its entitlement to Colorado River water is reduced as a result of completion and operation of the Central Arizona Project. At that time, unless major actions can be taken by California to increase the yield of the State Water Project to meet the required deliveries, Metropolitan's firm water supply will be insufficient to meet the estimated demands of the eleven million residents of its service area. Thus, a sizeable reduction in Metropolitan's Colorado River water supply in addition to that following commencement of operation of the Central Arizona Project will further impair its ability to meet its demands beginning in the late 1980s.

In Arizona, construction of the Central Arizona Project (CAP) is currently progressing. Plans for the CAP included water supply calculations of water available for delivery through the project. The Central Arizona Water Conservation District, created by the Arizona Legislature to contract with the Secretary of the Interior, entered into a contract with the Secretary and imposed taxes on property owners within three counties in Arizona to ensure repayment to the United States. The Arizona Water Commission has delivered to the Secretary of the Interior its recommendations for the allocations of municipal and industrial water to users requesting such water and is now considering staff recommendations for allocations of agricultural water.

All of the construction expenses, taxes, and allocations of water have been based on the expected supply which was determined by reliance on this Court's 1963 Opinion and 1964 Decree, including entitlements therein made to the five Tribes which the United States now seeks to relitigate. The Arizona Water Commission recommended to the Secretary of the Interior that 500,000 acre-feet be allocated to municipal and industrial users. If the Tribes obtain another 93,380 acre-feet of water rights (as claimed under recalculation in Arizona), this will reduce that allocation by approximately one-fifth. It will also decrease the supply allocated to five *other* Indian tribes in Central Arizona to be delivered through the CAP.

Special Master Rifkind specifically adopted the practicably irrigable acreage test to provide certainty and stability for the State Parties and others which serve approximately 12 million people and hundreds of thousands of acres of prime farm land. The United States' characterization of the recalculation of irrigable acreage

as "relatively minor adjustments" (U.S. Motion, p. 29) does not accurately indicate the potential impact of such changes on the State Parties. In the event the Court grants the requested modification and permits 114,655 acre-feet of additional diversions annually chargeable against Arizona, California, and Nevada, the increased Indian Tribe allocation to Colorado River water could reduce the allocation of those State Parties which have contracts with the United States for delivery of Colorado River water.

Special Master Tuttle's order postponing a ruling on the propriety of so-called "omitted lands" claims, but nevertheless allowing a full evidentiary presentation as to such claims, is, in effect, a ruling that such claims can be considered under Article IX of the 1964 Decree. Such a result, if permitted to stand, would transform Article II into an open-ended provision. In order to fully protect their interests, the State Parties under an open-ended decree would properly demand, and would logically and equitably be afforded, the reciprocal right to relitigate all the reservation irrigable acreage issues originally presented before Special Master Rifkind, as well as the question of the proper date as of which practicably irrigable acreage should be determined. In addition, the strategy of the parties in presenting their positions before the previous Special Master was based, in part, on the claims then being asserted by the United States. Indeed, the State Parties chose not to contest the presentation of practicably irrigable acreage on the reservations. To permit the United States at this late date to augment its claims within the conceded boundaries without permitting the State Parties the right to relitigate the determinations of irrigable acreage would be a great injustice. The

resulting wasted effort and expense in judicial administration entailed in such relitigation is one of the abuses sought to be remedied by the doctrines of *res judicata* and collateral estoppel. A trial before Special Master Tuttle would necessarily involve pretrial discovery, consultants' expenses, presentation of witnesses, cross-examination, rebuttal witnesses, legal arguments, and briefing. A ruling from this Court at this time may well obviate the necessity for the large investment of time and money.

Apart from the public policy considerations behind the doctrines of *res judicata* and collateral estoppel, the patent invalidity of the United States' position based on the erroneous concept of omitted lands invites review by this Court at the earliest possible date. The 1964 Decree did not allocate water to specific lands within the respective reservations. The Decree only fixes the total amount of water available to each reservation. There were no findings as to what specific lands were irrigable and such lands cannot be identified from the findings. Because the water allocated was not directly tied to any described land, Special Master Rifkind made no determination as to what land was "included" and what land was "omitted" in his qualification of practicably irrigable acreages.

The interests of the State Parties in certainty in their legal rights to Colorado River water, freedom from repetitious, harassing, and expensive litigation must not be sacrificed to compensate the Tribes for alleged inadequate representation in the original lawsuit. It must be borne in mind that the United States was diligent and comprehensive in advancing the interests of the Indian Tribes in the original case. Indeed the substantial water allocations awarded the Indians reflect

the great competency of their representation by the government. The present independent counsel of the Indian Tribes concede the current representation by the United States is no less competent. Even assuming *arguendo* the Tribes were inadequately represented by the United States in the original lawsuit, they are not without a remedy; they may institute suit against the United States for monetary damages in the United States Court of Claims. (28 U.S.C. 1505.)

In order to avoid a costly and unnecessary trial, it is respectfully requested that the Court direct the Special Master to rule on the issue of *res judicata* as applied to the United States' claims of "omitted lands" or, in the alternative, rule itself on that issue.

II

SPECIAL MASTER TUTTLE, IN ACCEPTING THE DISPUTED RESERVATION BOUNDARIES URGED BY THE UNITED STATES AND PROCEEDING TO TRY THE ISSUE OF PRACTICABLY IRRIGABLE ACREAGE WITHIN THE ADDED LANDS FOR PURPOSES OF INCREASING THE WATER ALLOCATIONS FOR THE RESERVATIONS, IS ACTING CONTRARY TO THE COURT'S 1964 DECREE ALLOWING ADJUSTMENT OF WATER ALLOCATIONS ONLY WHEN THE DISPUTED BOUNDARIES HAVE BEEN FINALLY DETERMINED

A. Introduction

The motions of the United States and the five Indian Tribes for modification of the Court's 1964 Decree allocating water to the respective Indian reservations include claims of additional water entitlements based upon asserted restoration of Indian lands through "final" resolution of boundary disputes. (U.S. Motion, pp.

8-17.) Ordinarily, it would be satisfactory for the parties whose rights are jeopardized by these claims to await action by the appointed Special Master on the merits of these claims before seeking relief for error committed by the Special Master. In the present situation, however, a preliminary ruling of the Special Master so prejudices the State Parties that a review by the Court is essential at this time in order that said Parties be afforded their day in court.

Stated briefly, the claims of the Indian Tribes to additional water based upon additional reservation lands are dependent upon two factors: first, a favorable determination of disputed boundaries; and second, a determination of practicably irrigable acreage within such added lands. The Special Master by order of August 28, 1979, has precluded the State Parties from challenging the reservation boundaries advanced by the United States and the Tribes and will proceed to hear evidence on practicably irrigable acreage within the added lands. He has accepted certain administrative orders of the Secretary of the Interior and court decrees, in which the State Parties were not represented, as constituting final determinations of disputed reservation boundaries. This ruling is particularly anomalous when one considers that in the original proceedings before the previous Special Master leading to the Court's decision in 1963 and Decree in 1964, the parties conceded the boundary dispute to be a proper issue and, following full hearings, the findings of the Special Master were, in the main, favorable to the State Parties. (Report of Special Master, December 1960, pp. 254-287.) Although these findings were rejected for purposes of title determinations, they were the basis for the reservation water allocations determined by the Special Master and ac-

cepted by this Court. (Opinion of the Court, *supra* at 601.)

In the following argument we will demonstrate that while the Court in its 1964 Decree provided for the possibility of adjustment of the water allocations decreed for the reservations "in the event that the boundaries of the respective reservations are finally determined" (Decree of the Court, *supra* at 345), it did not intend that the disputed boundaries issue could be resolved by unilateral action of only one of the sides to the water entitlement controversy.

Moreover, a serious question exists as to whether the States Parties would have standing to challenge the boundary determinations made by the Secretary of the Interior in another judicial proceeding. Hence the Special Master's ruling may preclude challenge to those determinations by the parties whose water rights are directly affected.

Accordingly, it is essential that the Special Master be directed to allow the disputed boundaries question to be tried as a pre-requisite to any trial of alleged practicably irrigable acreage within claimed added reservation lands.

B. Significance of the Disputed Reservation Boundaries Issue

In order to fully appreciate the significance of the erroneous ruling of the Special Master in accepting as binding upon all the parties, for purposes of revising the water allocations, the disputed boundaries advanced by the United States and the Tribes, it is necessary to consider the litigation context in which this question originated.

The instant case arose in 1952 essentially to apportion the waters of the Colorado River among the States of Arizona, California, and Nevada. The United States intervened to assert its various interests. With respect to claims of the United States, the issues included allocations of water to five Indian reservations based upon their *Winters* doctrine rights,[2] although that part of the case was secondary compared with the other issues. Nevertheless, the issues relating to water entitlements of the Indian reservations were fully tried. These issues involved disputed boundaries of two reservations and the amount of practicably irrigable acreage of each of the reservations (Opinion of the Court, *supra*, at 600-601.) Following trial, the Special Master made rulings in favor of the California position on the disputed boundaries, except for two instances involving avulsive changes of the river, and determined the practicably irrigable acreage within the determined reservations and allocated water accordingly. His determinations were incorporated in his report to the Court. (Report of Special Master, December 1960, pp. 254-266.)

In these earlier proceedings, it was readily seen by all parties that rulings on water entitlements for the reservations necessarily involved boundary adjudications where the boundaries were in dispute, for the water entitlements are dependent in part upon the extent of the reservations. Unfortunately, it was not realized until the proceedings before the Special Master were completed that private individuals had an interest in the adjudication of reservation boundaries and they were not parties in the case. For this reason, the

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[2]*Winters v. United States, supra*, 207 U.S. 564 (1908).

California parties in their brief before the Court urged rejection of the Special Master's boundary determinations. (*See* Opening Brief of the California Defendants in Support of their Exceptions to the Report of the Special Master, dated May 22, 1961, at pp. 279-282.) The Court was essentially faced with the dilemma of a water rights adjudication that necessarily involved boundary or title adjudications but which lacked necessary parties. Rather than remand the case for new proceedings, the Court rejected the boundary adjudications but adopted the Special Master's water allocations based upon his boundary determinations.

> ". . . The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable.
>
> We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave [sic] Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time." (Opinion of the Court, *supra*, at 601.)

In short, the Court made the best of an unfortunate situation but recognized by way of Article II(D)(5) of its Decree that the matter was not being fully laid to rest.

> ". . . the quantities fixed in this paragraph [Fort Mojave Indian Reservation] and paragraph (4) [Colorado River Indian Reservation] shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the

boundaries of the respective reservations are finally determined." (Decree of the Court, *supra*, at 345.)

The instant argument concerns the meaning to be given to the above statement of the Court and, particularly, the words "finally determined".

C. Interpretation of the Court's Intent in Providing for Adjustment of Reservation Water Allocations

Special Master Tuttle by his Memorandum and Report has ruled that certain orders of the Secretary of the Interior and judgments in actions in which the State Parties were not represented, meet the Court's test of final determination of disputed reservation boundaries.

> "I conclude that the determinations that have been made with respect to the stated boundary changes may be accepted as final for the purpose of considering additional allocations of water rights to the reservations". (Memorandum and Report, p. 36.)

In so ruling, the Special Master is irremediably prejudicing the parties contesting the additional water claims of the Indian Tribes. As we have pointed out, the claims based on lands allegedly restored to the reservations depend on a two-step process. First, the United States must establish that the added lands are, in fact, part of the reservations. Secondly, it must establish that such lands contain practicably irrigable acreage. The Special Master has relieved the United States from meeting the first requisite of these claims.

A number of considerations will show that the Special Master is in error in so interpreting the Court's 1964

Decree providing for adjustment of water allocations upon final determination of disputed reservation boundaries.

(1) Orders of the Secretary of the Interior

The Special Master adopted completely the position urged by the United States that the June 3, 1974 Order of the Secretary pertaining to the Fort Mojave Reservation, the January 17, 1969 Order of the Secretary pertaining to the Colorado River Reservation, and the December 20, 1978 Order of the Secretary pertaining to the Fort Yuma Reservation, are the "final determinations" of the disputed reservation boundaries intended by the Supreme Court in Article II(D)(5) of its 1964 Decree.[3] We submit this conclusion cannot stand up to reason.

First, the Supreme Court was well aware that the boundaries of the Fort Mojave and Colorado River Indian Reservations were disputed and when subjected to the truth-seeking procedures of trial, the essential position of the United States was defeated. While the Court did not feel the boundary adjudications were appropriate in the water rights suit, it nevertheless adopted the Special Master's allocations of water for the reservations based upon his boundary determinations. Hardly, then, is it reasonable to infer that the Supreme Court's reference, to "final determination" of the disputed boundaries, merely contemplated unilateral pronouncements by one of the adversary parties to the boundary disputes. Yet that is the interpretation placed on the Supreme Court's language by the Special

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[3]Although Article II(D)(5) of the 1964 Decree refers to the disputed boundaries of only two reservations, the State Parties have not objected to its application to the other reservations as well.

Master in his accepting Secretarial orders as binding determinations of disputed boundaries. It is totally unreasonable to conclude that the Court intended invaluable water rights to turn upon administrative actions of one party to a legal dispute, especially where that party, with two minor exceptions, had not succeeded after full trial of its position.

Moreover, if administrative action of the United States was all that was required to resolve the boundary disputes of the different reservations, did not the Court already have that, in substance, by way of the pleadings and position put forth by the United States in the original proceedings in 1956? To argue that what was lacking for "final determination" of each reservation boundary dispute was merely an appropriate order of the Secretary of the Interior is to accuse the Supreme Court of putting form over substance. Clearly, it was not administrative action of the United States that was intended by the Court when it provided for adjustment of water allocations should the disputed reservation boundaries be "finally determined," but, rather, determinations of an impartial tribunal. Indeed, that has been the traditional manner of resolving disputes in our system of government.

Nor should we overlook what has become the essentially transitory nature of the administrative actions that the United States would have us believe are the "final determinations" of reservation boundaries intended by the Court to allow water allocation changes. The unilateral action taken by the Secretary of the Interior is almost shocking in the case of the December 20, 1978 Secretarial order relating to the Fort Yuma Reservation. In this case, three previous Department of the Interior Solicitor opinions over a forty-one

year period (Margold-1936, Weinberg-1968, Austin-1977) had found invalid the Indian claim to enlarged reservation boundaries. The last of the three was issued only after the State Parties and representatives of the Indians' position had been afforded opportunity to argue the matter before then Solicitor Austin. Recently, Solicitor Krulitz has summarily reversed Solicitor Austin's opinion, finding the Indian claim to be valid, and the Secretary of the Interior has made an Order to that effect. The Krulitz opinion as issued without any prior notice or opportunity to be heard by the State Parties. The Fort Yuma Secretarial order was issued the same day as the opinion, followed the next day by the filing of the United States' motion to modify the water allocations. One wonders how any Secretarial order could ever be considered "final", even for administrative purposes within the Department, when the underlying Solicitor opinions may vary in conclusion from one occupant of that office to the next. The ultimate absurdity is the apparent contention by the United States that somehow the December 20, 1978 Secretarial order became final the minute it was issued.

Finally, it should be observed that this Court's recent order of January 9, 1979, granting a joint motion of the parties for entry of a supplemental decree determining miscellaneous present perfected rights in this case, after directing satisfaction of all rights of the five Indian reservations in time of shortage, states:

> ". . . provided that the quantities fixed in paragraphs (1) through (5) of Article II(D) of said [1964] Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court *in the event that the boundaries of*

the respective reservations are finally determined. . . ." (Emphasis added) (58 L.Ed.2d 627 [1979].)

There can be little doubt, in view of the language italicized above, that the parties in requesting entry of this order and the Court in making the order regarded the reservation boundary questions still unresolved. If the disputed boundaries had already been "finally determined," it would not make sense to so word the proviso. Yet the administrative actions and the judicial rulings relied upon by the United States and adopted by the Special Master as final determinations of the reservation boundary disputes occurred prior to entry of the above order, several years before, in most instances.

In treating these orders of the Secretary of the Interior as final determinations of the boundaries, thereby adding reservation lands which in turn became a basis for claims to additional water, the Special Master is permitting the United States to accomplish what it could not achieve through trial—establishing the validity of the reservation boundaries it asserts. The inequity to those whose water supply will be affected, in denying them the opportunity to protect their interests, is all too plain. We should not ascribe such an intention to this Court in interpreting the subject provision.

(2) Federal Court Cases Involving Reservation Boundaries

In addition to Secretarial orders, the United States relies upon and the Special Master has accepted certain federal court adjudications involving ownership or possession of land claimed to be part of an Indian reservation (U.S. Motion, pp. 17-23; Memorandum and Report, p. 36.) Again, in accepting the position of

the United States that the effect of these cases is to "finally determine" disputed reservation boundaries for purposes of water allocation adjustment, the Special Master is depriving the parties who will be affected by the water allocation adjustments of the opportunity to protect their interests. The State Parties did not claim title to any of the boundary lands in dispute in the original proceedings in 1956 and make no claim of ownership today. Yet in 1956 they were able to challenge the reservation boundary claims of the United States in order to protect their water entitlements. We agree with the United States and the Special Master that this is a water rights case, not a land title suit. We do not seek to challenge title determined in any of the cases relied upon by the United States. On the other hand, not having been parties to those actions, we should not be bound by those adjudications. And, particularly, we should not be bound by those boundary determinations insofar as they affect consequential water rights. In short, under the doctrine of *res judicata* the parties to those actions are properly bound by title determinations but those who were not parties are free to adjudicate the proper boundaries in a separate action to establish water rights which depend, in part, on the true reservation boundaries.

The rule denying the right to apply the doctrine of *res judicata* against strangers to the prior action is based upon principles of justice, fairness, and requirements of due process of law. See *Bruszewski v. United States*, 181 F.2d 419 (3rd Cir. 1950), cert. den. 340 U.S. 865 (1950); *Graves v. Associated Transport, Inc.*, 344 F.2d 894 (4th Cir. 1965); *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942). The reason for the rule is based on the fact that

a stranger to an action does not have the opportunity available to the parties to prove or ascertain the truth of the questions at issue. See, *Hale v. Finch*, 104 U.S. 261 (1881). The justification for this rule is well illustrated by the large number of stipulated judgments confirming tribal title that have been entered in federal court cases[4] following the 1964 Decree. We believe that in the absence of these stipulated judgments, it is unlikely that the non-Indian litigants would have had any water supply for their land. In contrast to these stipulated judgments, it is noteworthy that in the adversary proceedings before the previous Special Master, the major boundary claims asserted by the United States were defeated.

Similarly, the rule of collateral estoppel does not operate to affect strangers to a judgment, that is, to affect the rights of those who are neither parties nor in privity with a party. See *Gratiot County State Bank v. Johnson*, 249 U.S. 247 (1919); *Greene v. General Foods Corporation*, 517 F.2d 635 (5th Cir. 1975).

Thus neither of these doctrines bar the State Parties from contesting the asserted reservation boundaries in this case.

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[4]Stipulated judgments were entered in the following cases: *United States v. Denham*, 73-495-ALS (U.S. D.C., 1975); *United States v. Curtis*, 72-1624-DWW (U.S. D.C., 1977); *Cocopah Tribe of Indians v. Rogers*, 70-573-PHX-WEC (1975); *United States v. Brigham Young University*, 73-3058-DWW (U.S. D.C., 1976).

D. Reasoning of the Special Master in Support of His Ruling

The Special Master correctly sets forth the relevance of the boundaries to the ultimate issue of the case—*Winters* doctrine water allocations (Memorandum and Report, p. 37). To make water allocations that depend on practicably irrigable acreage it is essential to know the extent of the reservations. The Special Master then states "The model of the previous treatment of the boundary determinations by the court itself much weakens the contention of the State Parties." Examination of the previous treatment of the boundary determinations, however, strengthens rather than weakens our position. Although the Court rejected the previous Special Master's attempt to adjudicate the boundary disputes, *per se,* it did not reject such determinations by the Special Master for purposes of calculating water allocations for the reservations in question. This is precisely what the State Parties wish to do here. There is no less reason today for the United States to establish through trial that the lands for which it claims additional water are within the respective reservations than there was in the 1956 proceedings, the model referred to by Special Master Tuttle.

The Special Master reasons further that the Court, in rejecting the proposed adjudication of the reservation boundary disputes, indicated it was adequate to settle title disputes elsewhere and merely left open for future adjustment the water allocations based upon such resolutions of the boundary disputes (Memorandum and Report, p. 38). Two observations are appropriate in this regard. First, while the Court did imply that the reservation boundary disputes may be adjudicated elsewhere, it by no means precluded their resolu-

tion in this Court in appropriate circumstances. Assuming the feasibility of joining the necessary parties claiming title adverse to the United States, such a course has much to commend it. Secondly, and more pertinent to the ruling of the Special Master prohibiting the State Parties from challenging the boundaries asserted by the United States, is the fact that nothing in the Court's decision permits the return to this Court to seek adjustment of the reservation water allocations without *first* establishing that the boundary disputes have been "finally determined". Yet this is precisely the position of the United States. It argues resolution of the boundary disputes is not proper in this Court but has not shown final determinations have been obtained elsewhere. It relies merely on its own actions, Secretarial orders and stipulated judgments for the most part. We have indicated above why such orders and judgments are not the final determinations intended by the Court as a condition to seeking modification of the decreed water allocations.

The Special Master interprets the Court's decision as contemplating that the Court might be called upon to settle title disputes; this could result from someone initating litigation to establish title in order to be entitled to water; it would not be litigation instituted by anyone seeking a collateral determination of title. (Memorandum and Report, pp. 38-39.) However that may be, it does not follow that the United States may dispense with the prerequisite of establishing that the added land for which it demands additional water is within the reservation. Since that has not been established elsewhere by adjudication binding on the State Parties, it would have to be established in these proceedings if the additional water claims of the United

States are to be further considered. In this regard, we have noted that Special Master Rifkind in 1956 tried the boundary disputes as a necessary incident to determining water allocations for the reservations. None of the parties challenged his authority to do so, although they ultimately differed as to whether that determination could properly be for title purposes or only for the purpose of allocating water.[5] The order appointing the current Special Master is identical to that appointing the Special Master in 1956, with regard to such authority.

The Special Master points out that in the administration of public lands, the United States may survey, resurvey and adjust its surveys, and notes that none of the State Parties makes claim to land in any of the disputed areas (Memorandum and Report, p. 40).

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[5]Ironically, it was the United States that then insisted that boundary determinations be binding adjudications for title as well as water allocation purposes:

"In the process of determining the irrigable acreage of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation and the consequent quantity of the water rights to be decreed for these Reservations, the Special Master had to resolve disputes between the United States and California concerning the proper location of the western boundary of each of these Reservations.

. . .

The determination of the boundary of each Reservation is an essential prerequisite to the determination of the quantum of the water rights for that Reservation. There is no question of the Court's jurisdiction to resolve boundary questions nor of the authority of California to act as *parens patriae* for its citizens in such matters. *Rhode Island v. Massachusetts*, 37 U.S. 657. We oppose the disclaimer proposed by California because of its possible derogative effect upon the water rights herein decreed by the United States." (Answering Brief of the United States, August 1961, pp. 94-95.)

The California parties' 1961 Opening Brief specifically urged the Court to refrain from adjudicating title, pointing out that individual land claimants who would be affected were not parties to the proceeding.

He then concludes that the interest of the State Parties is met by allowing a reduction, *pro tanto*, of the reservation water allotment should it be determined in subsequent title litigation that any of the lands found practicably irrigable are not within the respective reservations. This conclusion is curious indeed. The party seeking additional water based upon disputed reservation lands will not first have to establish the lands are part of the reservation; rather, this element of the cause of action will be presumed based upon the unilateral administrative actions of that *same* party. On the other hand, the adversary party will only have the opportunity at some later time, if at all, to seek adjustment of the water allocation in the event that someone else's litigation establishes the lands in question are not, in fact, part of the reservation.

This unique approach is the very opposite to that taken by the Court in the 1964 Decree. Special Master Rifkind had determined the disputed reservation boundaries through adversary proceedings, not by passive acceptance of administrative determinations of federal agencies. Only then did he determine the water allotment for the delineated reservations. The Court approved this and provided for future adjustment should title of disputed lands be subsequently settled. The current Special Master would turn this about and award water allotments based upon what are essentially the mere assertions of the United States, without requiring the disputed boundaries be judicially established, and place the burden upon the parties whose water supply will be adversely affected to seek adjustment in the event of a later title adjudication reducing the reservations. We submit that no precedent exists for this result, and our standards of justice require its rejection.

In his concluding comments on this issue, Special Master Tuttle adopts the position put forward by the United States, to wit:

> "It would be wholly arbitrary to consider the Reservation boundaries as they were understood in 1964 to be sufficiently 'determined' to support a specific water allocation calculated on acreage—albeit no court judgment has ever vindicated the survey—but to deny comparable affect (sic) to subsequent dependent surveys of the boundaries because no court had approved them." (Memorandum and Report, p. 41.)

What the Special Master is saying, in accepting the argument of United States (U.S. Motion, pp. 13-14) is that since some of the administrative actions of the United States establishing boundaries of Indian reservations were not challenged and therefore were used in the calculation of the water allocations for those reservations, it would be inconsistent and therefore wrong to treat comparable administrative actions of the United States regarding boundaries of other reservations differently. A moment's reflection will disclose the flaw in such reasoning.

As we have noted, the burden of the United States, in the proceedings culminating in the 1964 Decree of the Court, as well as today, in establishing the water entitlements for the reservations, is to prove two elements: (1) that the acreage for which *Winters* doctrine water rights are claimed is within the reservation boundaries; and (2) that it is practicably irrigable. The adversary parties may, of course, contest both of these elements. But it does not follow that they must contest the situs of the acreage in question as to each reservation in order to contest that element as to a particular

reservation. The contrary conclusion would require needless and therefore wasteful trial proceedings. In fact, the State Parties in the 1956 proceedings disagreed with the boundaries asserted by the United States only for the Fort Mojave and Colorado River Indian reservations. They properly contested those boundaries but not those asserted for the remaining three Indian reservations. No one contended, then, that in so proceeding the Special Master and the State Parties were being arbitrary with regard to the judicial respect owed the administrative determinations of the different reservation boundaries. It is no more sound to so conclude today.

The fact that a party does not challenge a particular reservation boundary is not an indication or concession that such administrative determinations are final or binding but merely that the opposing party is willing to accept it for purposes of the litigation at hand. Such a decision in litigation has no bearing on the legal effect of similar administrative determinations and the right of a party to challenge them.

We have pointed out in our Response to the Motion of the United States for Modification of Decree that administrative determinations such as Secretarial orders relied upon by the United States are not the products of hearings or proceedings in which persons adversely affected have the opportunity to present, by evidence and argument, their views. The Department of the Interior, Office of the Solicitor, in a letter dated January 3, 1979, states there are no administrative procedures available to challenge Secretarial orders and that review of such matters must take place in a judicial forum. (A copy of said letter marked Exhibit A is attached to our Response to the Motion of the

United States for Modification of Decree, dated February 14, 1979.) However, a person suffering a legal wrong because of action of a federal agency is entitled to judicial review of that action. (See 5 U.S.C. 702; *Chicago v. United States,* 396 U.S. 162 (1969); *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967); *Citizens Ass'n. of Georgetown, Inc. v. Zoning Com'n. of D.C.,* 477 F.2d 402 (D.C. Cir. 1973); *Gordon & Co. v. Board of Governors of Fed. Reserve Sys.,* 317 F. Supp. 1045 (D. Mass. 1970).) Therefore, the Secretarial orders relied upon by the United States may be functional for administrative purposes of the federal government but cannot be considered final for the purpose of establishing claims for Indian reservation water entitlements adverse to the State Parties. The United States, not having obtained final determinations of the disputed reservation boundaries in another judicial forum, must do so in these proceedings if they are to proceed with their claims to additional water allocations based upon expanded reservation boundaries.

E. Standing of the State Parties to Challenge the Secretary's Determinations of Disputed Boundaries in Other Proceedings

In accepting the Secretarial orders and judgments as final determinations of disputed reservation boundaries for the purposes of allocating additional water, the Special Master is seriously inhibiting the State Parties' ability to protect their interests. We have already pointed out that the Secretary of the Interior does not afford any administrative opportunity for challenging his orders and that we were not parties to the litigation relied upon. Thus, we must look to a judicial

forum to challenge these actions of the Secretary fixing reservation boundaries which affect our water rights. But it is by no means clear that we have standing to raise such issues. The Special Master notes, "I am aware of no claim to land in any of the disputed areas by any of the State Parties." (Memorandum and Report, p. 40). His earlier statements, disclaiming any determination of the correctness of the boundary lines he is accepting or that the cited boundary litigation is *res judicata* as to those who were not parties, do nothing to alleviate the problem of standing.[6]

The United States, too, has recognized the existence of the standing question. In argument, on October 10, 1978, before this Court on the Joint Motion for Entry of a Proposed Supplemental Decree and the intervention motions of the five Tribes, Louis F. Claiborne, Office of the Solicitor General, responded to a question on the boundary changes posed by Mr. Justice White.

Mr. Justice White: "Are those boundaries subject to attack in the district court now or not?"

Mr. Claiborne: "A difficult question, Mr. Justice White. . . . we would wonder who had standing to challenge them—that is, the boundaries. . . . The states—this is all public domain land, it is not state land—in principle have no standing. They may say that because it affects their water allocation, therefore they are a party aggrieved and therefore they have

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[6]"I make no findings with respect to titles to the land involved, either as to private claimants or as to any other contestant over the correctness of the boundary lines. Nor do I consider that the acts of the Secretary or of the courts in private litigation are *res judicata* of the boundaries as to present litigants who were not parties to such proceedings." (Memorandum and Report, p. 36).

standing. That would be a matter for debate, as to which I do not want to make binding concession. But it is a close question." (Transcript, pp. 61-62).

Thus, although the water rights of the State Parties are affected by the actions of the Secretary of the Interior in his determinations of disputed reservation boundaries, those parties may have no forum in which to challenge those determinations.

On the other hand, this question of standing is eliminated in the instant proceeding. All the parties whose water rights may be affected by the boundary determinations are before the Court. Therefore, the State Parties urge that this Court direct the Special Master to receive evidence, hear legal arguments, and resolve each of the boundary disputes. This approach is the only fair and expedient way to resolve the boundary lands claims. If the Special Master is not directed to resolve the boundary disputes, then the State Parties, assuming they are successful in surmounting the standing obstacle, must challenge the boundary determinations piecemeal in the district courts. Years could pass before every dispute is finally determined through the appellate process; and then any dispute resolved favorably to an Indian tribe would still have to come back to this Court for a determination of practicably irrigable acreage and establishment of water rights. By contrast, this Court, through the Special Master, can now resolve all the disputes at one time, and establish water rights where appropriate. The State Parties assert that this is the proper lawsuit in which the boundary disputes underlying water rights claims central to this case must be resolved and that so proceeding would be in the interests of all parties.

III

THE SPECIAL MASTER ERRED IN RULING THAT THE FIVE INDIAN TRIBES BE PERMITTED TO INTERVENE AND BE REPRESENTED BY INDEPENDENT COUNSEL

A. Introduction

The Special Master has allowed unconditional intervention by the five Indian Tribes so as to result in dual representation of tribal interests by the Tribes themselves and by the United States as trustee. In so doing, the Special Master has erroneously disregarded the right of three States to withhold consent to suit by the Tribes and has also misapplied the law relating to intervention in cases before this Court.

Arizona, California, and Nevada have the right to withhold consent to the intervention sought by the five Tribes. Arizona refused consent, but California and Nevada gave it on the condition, among others, that independent counsel for each intervening Tribe be designated the only counsel for purposes of arguing in court, presenting evidence, questioning witnesses, and entering into stipulations on behalf of the Tribe. The United States' role would be advisory only. However, both the Tribes and the United States rejected such a condition. The result is that no consent has been given, and while the two States would renew such an offer, its rejection precludes any intervention at this time.

Even were consent not required, however, the Tribes would have to meet the general requirements for intervention in a case before this Court. As we have argued previously, Federal Rule 24 is an applicable standard and the Tribes can qualify, if at all, only for permissive intervention. Yet, one requirement for

permissive intervention is that it not cause undue delay or prejudice, a likely result of the very dual representation the Tribes and the United States seek and which our rejected condition sought to prevent. Therefore, the Tribes do not qualify under Rule 24.

In addition to Rule 24, this Court has developed the "compelling interest" test to determine the propriety of intervention in original actions. The Tribes do not meet that test and intervention must also be denied on that ground.

Finally, it should be noted that the arguments of the Tribes in support of their motions to intervene have been considered by this Court in regard to a similar motion by the Navajo Tribe in the original proceedings and rejected.

B. Applicability of Sovereignty Immunity

As we have argued in previous pleadings in this matter,[7] the States of Arizona, California and Nevada are all immune from suit in federal courts without their consent by any or all of the five Indian Tribes irrespective of whether each Tribe is deemed a citizen of any one state, several states, or no state. The interventions sought by the five Tribes constitute suits against the States, and sovereign immunity is implicated

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[7] *See* Response of the States of Arizona, California, and Nevada and the Other California Defendants to Motion for Leave to Intervene as Indispensable Parties, Filed by the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribes, and the Quechan Tribe of the Fort Yuma Indian Reservation and joined by the National Congress of American Indians as Amicus Curiae, dated January 25, 1978, at pages 4-7; *see also* Response of the States of California and Nevada, the Coachella Valley County Water District, and the Imperial Irrigation District to the Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe for Leave to Intervene, dated June 1, 1978, at pages 3-6.

notwithstanding the fact that claims of the five Tribes to Colorado River water are already before this Court. Furthermore, 28 U.S.C. 1362 does not abrogate that immunity in a case such as this where the United States is already a party, asserting tribal claims as trustee.

(1) Interventions Sought Would Constitute Suits Against the Three States

Whether or not a suit is one against a state is not to be determined by formalities of the law of parties but by the actual effect a judgment in favor of the applicants would have against the state. "(T)he nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. *Ex Parte Ayers*, 123 U.S. 443, 490-99; *Ex Parte New York*, 256 U.S. 490, 500; *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 296-98." (*Ford Motor Co. v. Treasury Department*, 323 U.S. 459, 464 (1945).)

The five Tribes seeking to intervene claim additional present perfected rights above those quantified in the 1964 Decree in this matter. In so doing, they seek a judgment that would be contrary to the interests of all three States. There are claims for additional rights to use of water in each State. Any such claims for use of water in Arizona or Nevada would be adverse to the interest *parens patriae* of California since in time of extreme shortage, there would be more high priority claims for water in the other two States, claims that would be given priority irrespective of State lines or the overall apportionment of the Colorado River among the three States. (Decree of the Court, *supra*, Article II(B)(3).) Similarly, those

additional claims for use of water in California or Nevada would be adverse to Arizona and those for use of water in Arizona or California would be adverse to Nevada.

The relief sought by the five Tribes is not merely in the nature of an injunction prospectively directing the Secretary of the Interior to allocate Colorado River water in a different manner than previously decreed by this Court. The real effect of the relief would be to retroactively divest water rights priorities by moving rights in each State down the priority ladder and interposing ahead of them new rights in the other States which would be satisfied first in times of extreme shortage. The essential nature and effect of intervention, therefore, is to seek to take away water rights priorities in which each State has an interest *parens patriae*. By seeking to establish additional claims adverse to each of the three States, the intervention sought by the five Tribes would constitute a suit against the States.[8]

(2) State Immunity Is Implicated Notwithstanding This Court's Ancillary Jurisdiction to Hear Additional Indian Tribe Water Claims

The Special Master has held that the States' sovereign immunity is not implicated by the Tribes' motions to intervene because all claims asserted in intervention are ancillary to claims already before this Court, in this case, and as to which the States have no immunity. (Memorandum and Report, pp. 16-24.) We respectfully disagree.

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[8]We note that the Special Master has agreed with this conclusion. *See* Memorandum and Report, footnote 41, page 25.

The Special Master correctly reasons that this Court, in this case, provides the only forum for assertion of claims of the five Tribes to additional Colorado River water rights. However, he then makes an unwarranted jump to the conclusion that the Tribes themselves are entitled to intervene as parties to assert these claims because they must be presented here or not at all. But this overlooks the fact that the United States, as trustee for the Tribes, is already a party and is empowered to fully assert these claims to the same extent as the Tribes themselves. *Heckman v. United States*, 224 U.S. 413- 444-45 (1912). Ancillary jurisdiction applies to claims and provides that all ancillary claims can be heard; it is not concerned *per se* with what parties assert those claims, only that the claims can be presented. See *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922); *Natural Gas Pipeline Co. v. Federal Power Commission*, 128 F.2d 481, 485 (7th Cir. 1942). If the five Tribes were the only parties who could assert these claims, then ancillary jurisdiction might permit their intervention notwithstanding state immunity. In this case, however, the United States not only can assert those same claims as trustee, but is already a party. Therefore, ancillary jurisdiction does not require intervention and does not impact on state immunity.

(3) State Immunity Is Not Abrogated by 28 U.S.C. 1362 as Applied to This Case

The Special Master has ruled that even if state immunity is implicated by the attempts to intervene, that immunity, as against Indian tribes, has been abrogated by Congress through 28 U.S.C. 1362. (Memorandum and Report, pp. 25-30.)

Eleventh Amendment immunity may be abrogated by Congress authorizing suit against a state pursuant to the state's surrender of sovereignty in delegating to Congress its constitutional power. However, such authorization must be evidenced by clear Congressional intent. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-56 (1976); *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 282-85 (1973); *Parden v. Terminal Railroad Co.*, 377 U.S. 184, 190-92 (1964). Such is not present as regards 28 U.S.C. 1362 and its application to the present case.

In *Moe v. Confederated Salish and Kootenai Tribes, etc.*, 425 U.S. 463 (1976), this Court decided that section 1362 allowed Indian tribes to sue states in federal courts under certain circumstances without regard to state immunity. That decision did not include a holding as to any conditions precedent to such a suit, but in dictum, the Court stated:

> "Looking to the legislative history of § 1362 for whatever light it may shed on the question, we find an indication of congressional purpose to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought." (*Id.* at 472.)

We contend that the failure of the United States to assert the kind of claims made by Indian tribes seeking to sue states is a requirement for suit without consent under section 1362 and that such requirement has not been met in this case.

The Special Master concludes that this is no longer the prevailing interpretation of section 1362. He correctly cites two pre-*Moe* circuit court decisions for the proposition that Congress did intend to authorize suits

by Indian tribes only when the United States had declined to do so. *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F. 2d 1135 (8th Cir. 1974); *Fort Mojave Tribe v. LaFollette*, 478 F.2d 1016 (9th Cir. 1973). His ruling, however, ignores this Court's similar language in *Moe* (quoted *supra*), but notes that the Court did not actually make a holding on this point and argues that Congress could not possibly have so intended in view of *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 370 (1978) and other cases. However, *Poafpybitty* and its line of cases only say that the United States' *right* to sue does not preclude a tribe's right to sue. They do not address the issue of whether the United States' *exercise of its right* precludes a tribe suing. The Special Master's use of this line of cases is misplaced and his argument as to what this Court meant in *Moe* is wholly unconvincing. The language in *Moe* is totally consitent with the *Dorgan* and *LaFollette* cases and supports our view as to Congressional intent behind section 1362.

The two post-*Moe* district court cases cited by the Special Master are not inconsistent with our view. In *Aguilar v. Kleppe*, 424 F.Supp. 433 (DC, Alaska, 1976), the court does not discuss Congressional intent or conditions precedent to suit under section 1362 and, in any case, rules against individual Indians seeking to sue. In *Confederated Tribes of the Colville Indian Reservation v. State of Washington*, 446 F.Supp. 1339 (EDC, Washington, 1978), the court rules in favor of intervention by tribes but again does not discuss Congressional intent.

In conclusion, we agree with this Court's statement in *Moe* as to Congressional intent. Since any narrowing of state immunity would require clear and contrary

Congressional intent, we are convinced that section 1362 must be held to require failure of the United States to sue as a condition for suit by Indian tribes against the states without consent.

In this present case, that condition is not satisfied. The United States intervened originally as trustee to fully represent the interests of the five Tribes now seeking intervention. The United States did represent the Tribes as to their original claims and continues to do so as to their additional claims. This Court in *Moe* refers to "the kind of claims" that the United States could have brought but did not. There are two *kinds* of claims to additional water rights—boundary land claims and omitted lands claims. The United States has asserted both. While it might be argued that the larger amounts of practicably irrigable acreage asserted by the Tribes themselves represent claims not asserted by the United States, we doubt that section 1362 was intended so broadly. The amount of each claim is really a matter of strategy and tactics by whomever represents the Tribes' interests, and it hardly seems possible that Congress intended to allow a tribe to sue every time such a strategical or tactical difference arose with the United States. The crucial point is that the United States and the five Tribes both assert claims based on the same legal theories, and therefore it cannot be said that the United States has declined to assert tribal claims. Section 1362 does not authorize suits by the five Tribes in the present case.

C. Federal Rule 24 Requirements

The Supreme Court Rules do not address intervention, but Rule 9 applies to matters of original jurisdiction, such as this lawsuit. Section 2 of Rule 9 provides:

> "The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court."

Rule 24 of the Federal Rules of Civil Procedure concerns intervention and could appropriately be applied to the intervention motions before this Court and the Special Master.

Section (a) of Rule 24 deals with intervention as a matter of right, but one requirement is that the interest in intervention is not adequately represented by an existing party. We are convinced, as is the United States, that the five Indian Tribes seeking to intervene have been adequately represented by an existing party, their trustee, the United States. However, the Special Master concludes that the "Indian claims are not actually represented" by the United States to the extent that the claims made by the Tribes themselves exceed those made by the United States as trustee. (Memorandum and Report, p. 11.) This analysis is faulty. The only legitimate interest of the Indian Tribes is a fair quantification of their reserved water rights in order to serve the "reasonable needs" of their reservations, an interest that the United States effectively asserted in the original proceedings and continues to assert aggressively in the present proceedings. The fact that the Tribes are claiming more than the United States considers "reasonable" does not mean, as the Special Master erroneously assumes, that their interests are not being represented, or that they are not being "adequately represented" as required by Rule 24(a). As noted *supra*, these are strategic

and tactical variances, differences in judgment that certainly do not *per se* give rise to a finding of inadequate representation.

Section (b) of Rule 24 deals with permissive intervention and establishes three requirements, one of which is that intervention not cause undue delay or prejudice to the original parties. Rule 24(b) requires that a Court consider this factor in exercising its discretion. We therefore contend that the Court can only grant permissive intervention if prejudice to the original parties is avoided. In this case, we believe prejudice can be avoided only by placing a condition on intervention that will prevent dual representation for the intervening Tribes. However, the Tribes have refused to accept intervention on such conditions. The State Parties believe that the type of dual representation sought by the five Tribes and the United States and approved by the Special Master is inherently prejudicial to any of the other parties seeking to oppose the additional Indian Tribe claims. What could be more fundamental than the notion that each party has only one voice in a lawsuit? Yet, in this case, the Tribes want their own counsel *and* counsel of the United States, and they want each set of attorneys able to present its own case, independent of the other. To aver that all these attorneys will attempt to cooperate and coordinate is a hollow gesture. There will still be two voices speaking for each Tribe, and each voice will be able to be as independent of the other as it desires. If the United States attorneys and the private attorneys are so sure they can coordinate their efforts, then let them decide which one will be the official voice during litigation and which one the non-participating advisor.

It is erroneous to equate the dual representation sought by the Tribes to the presence in this lawsuit of multiple non-Federal parties, each with separate counsel. There are a number of non-Federal parties, but each is a separate entity with its own interests. The interests of the State of California are not identical with those of the different California water agencies, and the State does not represent these agencies. When the State has acted as spokesman for these agencies (and for the other States), it has done so only at the request of their respective counsel. But its interests have never merged with the interests of the other parties on whose behalf it spoke. By contrast, the United States actually represents each Tribe, and its interests as trustee merge with those of the Tribe. The interests of any one Tribe are identical whether represented by the United States as trustee or by private counsel. Therefore, what the Tribes want is dual representation for the same interests, while all the non-Federal parties have at present is single representation for each of a number of separate entities with different interests.

In conclusion, it is apparent that the five Tribes do not qualify for intervention as a matter of right and cannot qualify for permissive intervention as long as they reject that very condition on such intervention that would prevent undue delay and prejudice, the same condition attached to the consent to be sued given by California and Nevada.

D. The "Compelling Interest" Test

In addition to Rule 24, this Court has developed its own "compelling interest" test to govern intervention in original actions. In *New Jersey v. New York*, 345 U.S. 369 (1953), the Court denied the City of Phila-

delphia's request to intervene in that interstate water dispute on the ground that its interests were adequately represented by the Commonwealth of Pennsylvania, which had previously intervened. The Court relied on the *parens patriae* principle that a state "must be deemed to represent all its citizens", which it recognized as "necessary recognition of sovereign dignity, as well as a working rule for good judicial administration". (*Id.* at 372-73.) Consequently, it held that "an intervenor whose State is already a party should have the burden of showing some *compelling interest* in his own right, apart from his interest in a class with all other citizens and creatures of the State, which interest is not properly represented by the state." (*Id.* at 373; emphasis added.)

The *parens patriae* rationale is equally applicable to the analogous representation of Indian tribes by the United States, as to which this Court has concluded "there can be no more complete representation." *Heckman v. United States*, 224 U.S. 413, 444-45 (1912). Indeed, the Court has recognized as much in *United States v. Nevada*, 412 U.S. 534 (1973), in which it denied a motion by the United States for leave to file a complaint with the Court against Nevada and California to adjudicate certain water rights, including those it was asserting on behalf of the Paiute Indian Tribe. The Court relegated the United States to the district court, a course of action it found compelling in part because "individual users of water in the Newlands Project, who ordinarily would have no right to intervene in an original action in this Court [citing *New Jersey v. New York*] would have an opportunity to participate in their own behalf if this litigation goes forward in the District Court." (*Id.* at 538.)

Although the Court did not expressly state that the Paiute Indian Tribe would be under a similar disability, such an inference is reasonable, particularly since the Tribe had not sought to intervene.[9] The "compelling interest" test is particularly appropriate in the present action where the sole interests which the United States is asserting are those of the Indian petitioners (Memorandum and Report, p. 10), unlike a state's presumed representation of all its affected water users and other sovereign interests.[10]

The Special Master's reliance on the fact that a number of California water agencies are co-defendants with the State of California and are represented by independent counsel (Memorandum and Report, p. 16) ignores this Court's rejection of that same argument in *New Jersey v. New York, supra* at 374-75:

> "The presence of New York City in this litigation is urged as a reason for permitting Philadelphia to intervene. But the argument misconstrues New York City's position in this case. New York City was not admitted into this litigation as a matter of discretion at her request. She was forcibly joined as a defendant to the original action since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey."

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[9]*See United States v. Alpine Land and Reservoir Company*, 431 F.2d 763 (9th Cir. 1970).

[10]The Special Master's reliance on the fact that Indian tribes apparently have been permitted to intervene in actions of various kinds in the district courts and courts of appeals (Memorandum and Report, p. 15, n. 26) is misplaced. Apart from the fact that none of those interventions were contested, they are irrelevant to the far stricter rule which this Court has fashioned for original actions.

Neither the United States nor the Indian petitioners have demonstrated a compelling interest which would justify independent representation of the Tribes in these proceedings. Indeed, the Special Master's analysis turns solely on the undisputed fact that important interests of the Indian petitioners are involved and on what we have seen, *supra*, to be a faulty analysis which concludes that because Indian claims for additional water for several categories of land are greater than the United States claims for those lands, "the Indian claims are not actually represented" by the United States. (Memorandum and Report, p. 11.)

Although the Special Master asserts that "common sense suggests that those most directly affected by the litigation should be able to assert their own interests" (Memorandum and Report, p. 7), this Court has rejected that rationale in original actions where the states and the United States contend solely in their representative capacities. In *New Jersey v. New York, supra*, it refused to follow the Special Master's rationale and declined to permit Philadelphia to intervene for fear that the Court would "be drawn into an intramural dispute over the distribution of water" within Pennsylvania. Such a Pandora's box could well be opened in these proceedings, since the Special Master properly recognized that "even the interest of the Tribes among themselves are potentially adverse." (Memorandum and Report, p. 9.) *See also Utah v. United States*, 394 U.S. 89 (1969).

E. Previous Denial of Navajo Tribe Motion to Intervene

In determining that the several Indian Tribes should be permitted to intervene in this action and be represented by their own counsel, the Special Master has overlooked this Court's previous denial of the motion of the Navajo Tribe for leave to intervene in the earlier proceedings.

On September 25, 1961, while the report of Special Master Rifkind was pending before the Court on exceptions, the Navajo Tribe filed a motion for leave to intervene in these proceedings,[11] alleging generally that the Tribe was entitled to intervene because its interests had not been adequately represented by the United States. Arizona[12] and the United States[13] opposed the motion. California[14] and New Mexico[15] did not object, but simply requested an opportunity for a reasonable time to respond to the Navajo petition should the motion be granted.

Arizona pointed out that the Navajos and a number of other tribes (including the Colorado River Indian

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[11]"Motion on Behalf of Navajo Tribe of Indians of the Navajo Reservation, Arizona, New Mexico and Utah for Leave to Intervene, Brief in Support Thereof, and Petition of Intervention".

[12]"Brief of Arizona In Opposition to Motion of the Navajo Tribe of Indians for Leave to Intervene", filed October 16, 1961.

[13]"Response of the United States to the Motion on Behalf of the Navajo Tribe of Indians for Leave to Intervene", filed November 6, 1961.

[14]"Response of California Defendants to the Motion for Leave to Intervene, Tendered by the Navajo Indian Tribe, September 26, 1961", filed October 30, 1961.

[15]"Statement of New Mexico Relating to Motion on Behalf of Navajo Tribe of Indians for Leave to Intervene", filed November 1, 1961.

Tribes, currently petitioners in intervention) had previously filed a motion for leave to file a "representation of interest" with Special Master Rifkind in June 1956, which he had denied,[16] and which the Tribes had not pursued further. Arizona contended, *inter alia*, that (1) granting the Navajos intervention would constitute an unconsented-to suit against Arizona in violation of the Eleventh Amendment and (2) the United States had exclusive authority to represent the Tribe.

The United States argued that "it is plain that there is no basis for intervention by the Navajo Tribe either as a matter of right or as a matter of judicial discretion."[17] It argued that it had exclusive authority to represent the Navajos, that the petition was untimely, and that, in any event, the United States' representation had been fully adequate.

The Court denied the Navajo Tribe's motion without comment on November 20, 1961. (368 U.S. 917.) On December 27, 1961, the Navajo Tribe filed a motion for reconsideration,[18] which was also denied without comment on January 8, 1962. (368 U.S. 950.)

Although the Court did not indicate which arguments raised by the United States and Arizona in opposition to the Navajo petition it relied on, the above arguments are as valid today as they were then. If the United

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[16]Transcript of Proceedings before Special Master Simon H. Rifkind, pp. 2638-46, set out as an appendix to California's response, n. 13 *supra*.

[17]U.S. Response, n. 12, *supra*.

[18]"Motions by Navajo Indian Tribe for Reconsideration of Its Motion for Leave to Intervene and for Order to United States to Show Cause Why It Should Not Be Ordered to Account to the Court as to the Adequacy of its Representation of Navajo Interests; Brief in Support of Motions."

States' representation of Indian interests was considered adequate by the Court at a time when the United States was representing a number of important federal interests in addition to the interests of its Indian wards, it is even more so today when the Indian interests are the sole interests being asserted by the United States. (Memorandum and Report, p. 10.)

CONCLUSION

The controversy before the Court is an extremely important one—the allocation of a limited water supply. It is no less important to the State Parties than it is to the Indian Tribes. For this reason we have from the start supported initiation of these proceedings to resolve the controversy.[19] But while the State Parties have presented their positions on all aspects of the controversy to the Special Master for his consideration and ultimate ruling by this Court, the United States and the Indian Tribes seek to limit the issues and thereby circumscribe the ability of the State Parties to protect their interests. Thus, with respect to additional water claims for so-called "omitted lands" the United States and the Tribes would ignore the applicable law in bar of such claims. The Special Master supports this strategy by refusing to rule on the objections of the State Parties to hearing such claims and instead has directed trial on such claims. Similarly, on the equally significant claims of the United States and the Tribes to additional water based upon enlarged reservation boundaries, the

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[19]Response of Metropolitan Water District, *et al.*, to the Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe for Leave to Intervene and Petition of Intervention, dated June 1, 1978, at p. 9; Response of the States of Arizona, California, and Nevada and the other California Defendants to the Motion of the United States for Modification of Decree, dated February 14, 1979, at pp. 4-10.

United States and the Tribes would preclude the State Parties from questioning the correctness of their alleged boundary changes.

We are disappointed by this strategy for we have recognized the importance to everyone of resolving these issues. We are puzzled by the Special Master's whole-hearted adoption of the position of the United States and the Tribes since it is so blatantly unfair to the State Parties. Indeed, while the scarce water supply is extremely important, perhaps even more important is having a trial procedure that comports with judicial traditions of fairness—a procedure which permits both sides to protect their interests. This is not the case where the State Parties must proceed to trial on certain issues that have been tried and are barred from retrial and where other issues, the resolution of which bear directly on the water allocation determinations, will be excluded from the case. We believe that the Special Master is proceeding in a manner that denies fundamental fairness to the State Parties and is not calculated to obtain final resolution which is desired by all the parties.

In addition, the Special Master is permitting double legal representation of the tribal claims to additional water—that of the United States and, independently, that of each of the five Indian Tribes. We believe this ruling is prejudicial to the State Parties and creates an unsound precedent.

For the above reasons we urge this Court to reject the Special Master's Memorandum and Report on Preliminary Issues and direct the Special Master to afford full hearing and determine the reservation boundary issues, to rule on the State Parties' opposition to hear-

ings on additional water claims based on so-called "omitted lands" or, in the alternative, rule itself on this legal issue, and to deny the petitions for intervention of the five Indian Tribes so long as the United States, as a party to these proceedings, advances the Indian reservation water claims.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION FOR LEAVE TO FILE EXCEPTIONS

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STATE OF CALIFORNIA, ET AL.

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION FOR LEAVE TO FILE EXCEPTIONS

We here address only the question whether this Court should now entertain exceptions to a preliminary report filed by the Special Master. We oppose the motion tendered by the State parties for leave to proceed in this unusual manner.

1. The State parties themselves "recognize that in the normal course any exceptions to rulings of the Special Master would be filed after he has acted on all issues relating to intervention and tribal claims to additional water" (Motion 1). We entirely agree. The normal practice of this Court in original cases which have been referred to a Special Master reflects the traditional reluctance to permit piecemeal appeals, thereby overburdening appellate tribunals, delaying the final resolution of the case, and requiring decision of issues that may be mooted by the trial. Those considerations apply with special force to this Court. Unique circumstances

sometimes justify an exception to the usual procedure. But the State parties offer no sufficient reason here for departing from the conventional course.

2. The Special Master has not requested instructions from the Court. Compare Report of the Special Master dated October 15, 1979, in No. 65, Original, *Texas* v. *New Mexico*. Nor has the Court asked the Master now to submit his preliminary rulings for review. On the contrary, the Order referring the several motions for intervention and for further relief to the Special Master (439 U.S. 419) may fairly be read as directing him to proceed with the case to a final conclusion.

3. Until the present motion was filed, the Master and all parties have acted on this assumption. Although the formal Report is dated August 28, the Master announced at least two of the three rulings to the parties on July 16, and, since that earlier date, the parties and the Master have discussed and agreed upon the course of further proceedings. On November 7, the Special Master entered an order (appended hereto) adopting a detailed pretrial schedule with the consent of all parties. Also during this period, the United States has caused to be prepared, and distributed to all parties, preliminary reports of its experts detailing the additional water claims advanced and their justification. On the side of the claimants, these reports represent a major portion of the preparation for trial.

4. As we have just indicated, the present motion is ill-timed. It comes after a firm schedule of proceedings before the Special Master has been fixed, after much preparatory work has been completed, and after the United States has disclosed the core of its evidence for the scheduled trial. Granting the motion at

this point would be disruptive and would substantially delay resolution of the controversy. Since the trial is now set for May 1980, and is anticipated to last no more than two or three weeks, there is every reason to expect that the final report of the Special Master would reach this Court before the October Term 1980. In these circumstances, it seems wholly inappropriate for this Court now to entertain exceptions to interiocutory rulings of the Master.

5. Finally, there is no irreparable prejudice to the State parties in following normal procedures. If the Indian Tribes who have been permitted to intervene advance claims not also asserted by the United States, and the Special Master sustains some or all of such claims, and this Court ultimately holds that tribal intervention was improper—perhaps not the most likely scenario—such additional claims can readily be identified and disallowed.[1] And, similarly, should this Court disapprove the Master's ruling with respect to any or all the claims in respect of "boundary lands" or "omitted lands," there would be no difficulty in correcting the Master's findings to that extent. In sum, the Master's rulings will be fully reviewable at the end of the day if, after trial, they have any practical effect. There is no urgent reason not to await the Special Master's final report.

---

[1]The Special Master has made clear his intent to keep a firm reign on the parties and to minimize any delay or inconvenience that tribal intervention might entail (Report 16):

> It is my intention to have the order of proof and examination by the moving parties structured in a logical sequence which avoids duplication or accumulation, and where they are not, the State parties will be entitled to object. In short, there is no reason to anticipate that the parallel appearances by the United States and the Indian Tribes should yield any less coordination and cooperation than I have seen from the more numerous State parties, erstwhile adversaries.

Accordingly, we respectfully submit that the motion for leave to file exceptions to the Special Master's preliminary report should be denied.

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DECEMBER 1979

APPENDIX

UNITED STATES SUPREME COURT

BEFORE THE SPECIAL MASTER

NO. 8 ORIGINAL

PRETRIAL SCHEDULE

STATE OF ARIZONA, Plaintiff,

v.

STATE OF CALIFORNIA, et al., Defendants.

November 1 -	United States turns over preliminary experts' reports; designation of expert witnesses by all parties
January 4 -	Service of requests for production of documents
January 15 -	Last day to notice depositions
February 1 -	States, Intervenors turn over preliminary reports
	1. Beginning of depositions
	2. Final designation of all witnesses
	3. Answering date for production of documents
February 29 -	End of depositions[1]
March 10 -	Parties deliver their requests for admissions

[1]Any witness testifying that he has not reached his final conclusions with regard to studies conducted in connection with this litigation may be deposed again.

March 24 - Answering date for requests for admissions

April 7 - Meeting of counsel

I. Preparation of pretrial order

(a) designate those portions of the deposition testimony which the parties shall offer at trial;

(b) list proposed exhibits, and include one copy of each;

(c) designate those admissions which the parties desire to offer in evidence at trial;

(d) list each witness the party intends to call in its case in chief and a statement as to the scope of the witnesses' testimony;

(e) delineate the issues of facts;

(f) delineate the issues of law;

(g) state all agreed upon factual matters.

II. (a) review the time schedule for all subsequent steps in the litigation;

(b) explore the possibility of additional stipulation of facts;

(c) agreement on handling of documentary evidence, including authentication of documents;

(d) examination of witnesses;

(e) daily transcripts.

III. Final listing of exhibits and objections by opposing parties

April 14 - Filing of pretrial order

April 28 - Filing of pretrial briefs

May 26 - Trial

These dates may be subject to adjustment upon a showing of good cause. Parties requesting an extension or continuance from the court shall include an affidavit fully dscribing the reasons for delay.

So Ordered.

/s/ ELBERT P. TUTTLE

SPECIAL MASTER

NOVEMBER 7, 1979

Supreme Court, U. S.
FILED
DEC 17 1979
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

October Term, 1979
No. 8, Original

STATE OF ARIZONA,
Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,
Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,
Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,
Impleaded Defendants.

MEMORANDUM OF THE COLORADO RIVER INDIAN TRIBES IN OPPOSITION TO THE MOTION OF THE STATES OF ARIZONA, CALIFORNIA AND NEVADA AND OTHER CALIFORNIA DEFENDANTS FOR LEAVE TO FILE EXCEPTIONS TO THE MEMORANDUM AND REPORT OF SPECIAL MASTER ELBERT P. TUTTLE AND FOR STAY ORDER.

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In the

Supreme Court of the United States

October Term, 1979
No. 8, Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO, *Defendants,*

UNITED STATES OF AMERICA and STATE OF NEVADA, *Intervenors,*

STATE OF NEW MEXICO and STATE OF UTAH, *Impleaded Defendants.*

MEMORANDUM OF THE COLORADO RIVER INDIAN TRIBES IN OPPOSITION TO THE MOTION OF THE STATES OF ARIZONA, CALIFORNIA AND NEVADA AND OTHER CALIFORNIA DEFENDANTS FOR LEAVE TO FILE EXCEPTIONS TO THE MEMORANDUM AND REPORT OF SPECIAL MASTER ELBERT P. TUTTLE AND FOR STAY ORDER.

On August 28, 1979, Special Master Elbert P. Tuttle mailed to the Clerk of the Supreme Court for filing a Memorandum and Report on Preliminary Issues, together with notice thereof to all parties. Almost three months later, the State Parties have served the Colorado River Indian Tribes (hereinafter "Tribes") with their Motion

for Leave to File Exceptions to the Memorandum and Report of Special Master Elbert P. Tuttle and for Stay Order; Exceptions; and Opening Brief of Said Parties in Support of Their Motion and Exceptions (hereinafter "the Motion"). The Motion is based upon each and every substantive argument presented to the Court prior to referral to the Special Master. Since the parties are currently in the midst of the proceedings before the Special Master, the Tribes object to the Motion as being premature. Moreover, the Tribes respectfully submit that the Motion is untimely and prejudicial to them.

I. THE MOTION IS UNTIMELY AS MEASURED BY RULE 53 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Tribes recognize that the decision of the Court to dismiss or entertain the Motion of the State Parties is not dictated by normal rules of civil procedure. It is helpful, however, to refer to the Federal Rules of Civil Procedure, which serve as guidelines to the conduct of diligent, responsible jurisprudence.

Rule 53 (e) of the Federal Rules provides that a party may serve upon the other parties written objections to a master's report within ten days after notice of filing of the report. The objecting party is subsequently allowed to make application to the court by motion for action on the report and any objections thereto. This procedure comports with the principle common to appellate procedures at all levels that written objection to a judgment or order be made within a relatively short period of time in order to prevent unnecessary and unjust delay and prejudice to other parties involved.

It was not necessary for the State Parties to prepare elaborate pleadings for the purpose of notifying opposing parties, including the Tribes, of their intention to file ex-

ceptions to the Special Master's Memorandum and Report. However, if they wished to attempt to obtain review at this stage of the proceedings, the State Parties should have elected to make their exceptions to the Memorandum and Report and given notice thereof to the opposing parties within a reasonable period of time. Whether measured by the ten day period specified in Rule 53 or a standard of reasonableness, the State Parties in these circumstances have failed to timely serve the Tribes and other opposing parties with written objections to the Memorandum and Report. The Motion of the state parties therefore should be denied.

II. THE MOTION IS INCONSISTENT WITH PRIOR CONDUCT OF THE STATE PARTIES AND CONSEQUENTIALLY PREJUDICIAL TO THE TRIBES.

Prior to service of the Motion upon the Tribes, the State Parties indicated that they were pursuing preparation for trial before the Special Master. During that period of time the State Parties never suggested that the proceedings should be delayed or deferred for filing of objections to Special Master Tuttle's Memorandum and Report.[1] In fact, there has been extensive discussion between parties concerning establishment of a trial schedule and pre-trial procedure, and a schedule was agreed to, which resulted in the Special Master issuing a pre-trial schedule dated November 7, 1979. It included a deferred trial setting requested by the State Parties. In addition, during this period of time the State Parties requested and obtained per-

[1] The only indication to the Tribes that the state parties *might* file exceptions to the Report was by reference to a copy of the letter of Douglas B. Noble, Deputy Attorney General for the State of California, to Special Master Tuttle, dated October 31, 1979, in which Mr. Noble states that, "And while we continue our consideration of filing exceptions to your Report with the Supreme Court, as noted in our letter of September 19, we do not do so at the expense of preparation for trial."

mission and established a schedule to inspect the Reservation of the Tribes in preparation for trial, and that inspection has been conducted.

Prior to the preliminary findings of the Special Master as incorporated in his Memorandum and Report, the limited resources of the Tribes dictated that they refrain from extensive trial preparation until it was known whether they could actively participate. However, after the Memorandum and Report was filed, the Tribes undertook efforts and incurred expenses directed toward trial. Obviously, granting of the Motion at this unreasonably delayed juncture of the proceedings before the Special Master could result in unnecessary and unfair waste of the Tribes' resources. Sound and orderly jurisprudence would seem to dictate in these circumstances that the Motion of the State Parties should be denied.

III. THE REQUEST OF THE STATE PARTIES FOR REVIEW IS PREMATURE AND INAPPROPRIATE.

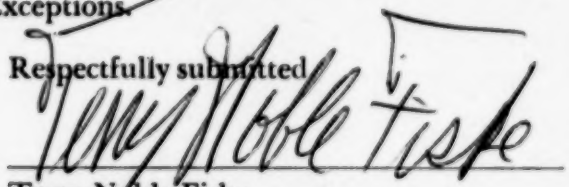
After extensive briefing and oral argument on the merits, the Court referred this matter to the Special Master. After further briefing and hearing, the Special Master filed his preliminary report on various issues. The State Parties have taken this opportunity to restate in the present Motion each and every argument previously presented to the Court without awaiting the final report of the Special Master. The attempt of the State Parties to have this Court preempt the Special Master at this early phase of the proceedings can only result in delay, confusion and waste of resources. The piecemeal approach of the State Parties should therefore be rejected. The State Parties will each have an opportunity to file exceptions to a final report of the Special Master.

CONCLUSION

The Tribes respectfully submit that there are two equally important reasons for denial of the Motion of the State Parties. First, the Motion and notice thereof are untimely and result in harsh, unwarranted prejudice to the Tribes. Second, an appeal of the interlocutory findings of the Special Master is premature and not in accordance with sound procedure. The posture of the Tribes is not to preclude eventual review of a final report of the Special Master but to assure prudent, orderly resolution of this matter. For these reasons we respectfully urge the Court to deny the Motion for Leave to File Exceptions and for Stay Order.

The Tribes also concur with and support the Memorandum for the United States in Opposition to Motion for Leave to File Exceptions.

Respectfully submitted,



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Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS
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No. 8, ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF ARIZONA,
COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,
DEFENDANTS

THE UNITED STATES OF AMERICA AND STATE OF NEVADA,
INTERVENERS

STATE OF UTAH AND STATE OF NEW MEXICO,
IMPLEADED DEFENDANTS

COLORADO RIVER INDIAN TRIBES, FORT MOJAVE INDIAN TRIBE, CHEMEHUEVI INDIAN TRIBE, COCOPAH INDIAN TRIBE, AND FORT YUMA (QUECHAN) INDIAN TRIBE,
RECOMMENDED INTERVENERS

Elbert P. Tuttle, *Special Master*

REPORT

February 22, 1982

TABLE OF CONTENTS

PART ONE

Page

I. STATEMENT OF THE CASE 3
A. PRIOR LITIGATION 6
1. Special Master's Report of 1960 6
(a) Division of Colorado River Water Among the States of the Lower Basin 7
(b) United States Claim on Behalf of Five Indian Reservations 10
2. Supreme Court Opinion on the Special Master's Findings—*Arizona v. California*, 373 U.S. 546 (1963) 13
3. The 1964 Decree—*Arizona v. California*, 376 U.S. 340 (1964) 15
4. Completing the Priority System Through Article VI of the 1964 Decree: The 1979 Decree—*Arizona v. California*, 439 U.S. 419 (1979) 18
B. PRESENT PROCEEDINGS 20

II. TYPES OF CLAIMS TO BE CONSIDERED 29

A. Omitted Lands—Preclusion 29
B. Final Determination of Boundaries 55
1. Fort Mojave Indian Reservation 57
(a) The Hay and Wood Reserve 58
(b) The LaFollette Tract 59
2. Chemehuevi Indian Reservation 60
3. Colorado River Indian Reservation ... 60
(a) The Benson Line 61
(b) The Northwest Boundary 61

4. Fort Yuma Indian Reservation 62
5. Cocopah Indian Reservation 62
C. Miscellaneous Boundary and Related Problems 76
1. Fort Mojave Indian Reservation 76
(a) United States Claims 76
(i) Intermediate Tract 77
(ii) Checkerboard Area 81
(iii) Adjustment to the United States Claims on the Fort Mojave Indian Reservation 84
(b) Fort Mojave Tribe's Claims of Error 85
2. Adjustments on the Colorado River Indian Reservation 87

III. PROOF OF THE CASE 88
A. Standard of Proof 88
B. The Quantification Standard—The Meaning of Practicably Irrigable 89
1. General 89
2. Profit Margin 99
C. Gross-to-Net Reduction in Acreage 100

IV. PRIORITY DATES FOR ADDITIONAL WATER RIGHTS 104

V. REQUESTED WATER RIGHTS 106

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO THE IRRIGABILITY OF DISPUTED LANDS 112

PART TWO

I. CLAIMS PRESENTED BY THE UNITED STATES 125

A. INTRODUCTION 125
B. SANDY LANDS 126
1. Low Moisture-Holding Capacity 127
2. Related Deficiencies of Sandy Lands 133
3. Economic Analysis of Sandy Lands ... 134
(a) Introduction 134
(b) Yields for Sandy Lands 134
(c) Production Costs on Sandy Lands 141
C. GRAVELLY AND COBBLY LANDS ... 145
1. Physical Analysis of the Parcels 147
(a) Calada Unit 148
(b) Unit FM-5 153
(c) Unit CH-4 155
(d) Unit CH-3 156
(e) Summary of Physical Analysis ... 157
2. Economic Analysis of Gravelly and Cobbly Lands 159
D. INCLUSION OF NON-ARABLE LANDS IN THE UNITED STATES CLAIMS 161
E. GENERAL COST DIFFERENCES 164
1. Capital Cost 165
2. Indirect Costs 167
3. Operation, Maintenance and Replacement Costs 170
4. Power and Energy Costs 172
(a) Power Rates 172
(b) Power Requirements 176
F. SIZE OF IRRIGATION UNIT AS CLAIMED AND AS PROVED 180
G. NEVADA'S CLAIM REGARDING THE USE OF WELLS 184
H. MISCELLANEOUS PROBLEMS ASSOCIATED WITH INDIVIDUAL PARCELS 187

I. CONCLUSIONS REGARDING THE PRACTICABLE IRRIGABILITY OF LANDS IN THE UNITED STATES CLAIMS 192

II. CLAIMS ASSERTED BY THE INDIAN TRIBES 197
A. CROP SUITABILITY 197
1. Pistachios 198
2. Almonds 203
3. Figs 218
4. Table Grapes 221
B. CLAIMS ASSERTED BY THE INDIVIDUAL INDIAN TRIBES 239
1. Fort Yuma Indian Reservation 239
(a) Lands South of All-American Canal 241
(b) Lands North of All-American Canal 242
(i) Engineering Design and Costs 242
(ii) Soil Classification 248
(c) Conclusions Regarding Practicable Irrigability of the Fort Yuma Indian Reservation Lands 254
2. Fort Mojave Indian Reservation 254
(a) Arability Questions 254
(i) Low Moisture-Holding Capacity 254
(ii) Other Alleged Soils Deficiencies 259
(iii) Other Arizona Lands 262
(b) Conclusions Regarding Practicable Irrigability of Fort Mojave Indian Reservation Lands 263

3. Colorado River Indian Reservation ...267
(a) Arability Questions 267
(i) Tribes Claims 267
(ii) State Parties' Argument Regarding Decreed Lands ...272
(b) Conclusions Regarding Practicable Irrigability of Colorado River Indian Reservation 272
4. Chemehuevi Indian Reservation 274
(a) Arability Questions 274
(b) Gross-to-Net Acreage Reduction 275
(c) Conclusions Regarding Practicable Irrigability of Chemehuevi Indian Reservation Lands 276

PART THREE

RECOMMENDED DECREE 281

APPENDICES

APPENDIX 1. Indian Reservation Boundary Determinations 285

APPENDIX 2. Payment Capacity Analyses 305

TABLE OF AUTHORITIES

CASES: *Page*

Aldinger v. Howard, 427 U.S. 1 (1976) 27
Arizona v. California, 373 U.S. 546 (1963), *decree entered*, 376 U.S. 340 (1964), *decree amended*, 383 U.S. 268 (1966), *supplemental decree entered*, 439 U.S. 419 (1979) ..... passim
Boesche v. Udall, 373 U.S. 472 (1963) 70
Borax Consolidated Ltd. v. City of Los Angeles, 296 U.S. 10 (1935) 69, 74
Briggs v. Pennsylvania R.R., 334 U.S. 304 (1948) 34
Cragin v. Powell, 128 U.S. 691 (1888) 69, 72
Freeman v. Howe, 65 U.S. (24 How.) 450 (1861) 27
Hansberry v. Lee, 311 U.S. 32 (1940) 54
Heckman v. United States, 224 U.S. 413 (1912) 30
Knight v. United States Land Ass'n, 142 U.S. 161 (1891) 69
Lane v. Darlington, 249 U.S. 331 (1919) 70
McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 68
Messenger v. Anderson, 225 U.S. 436 (1912) 36
Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976) 27
Montana v. United States, 101 S. Ct. 1245 (1981) 90
Nebraska v. Wyoming, 325 U.S. 589 (1945) 35
New Jersey v. New York, 283 U.S. 336, *decree entered*, 283 U.S. 805 (1931), *modified*, 347 U.S. 995 (1954) 33, 57
Northern Pac. Ry. v. United States, 227 U.S. 355 (1913) 72
Oklahoma v. Texas, 256 U.S. 602 (1921) 66
Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) 27

Russell v. Maxwell Land Grant Co., 158 U.S. 253 (1895) 69
Snyder v. Sickles, 98 U.S. 203 (1878) 69-70
Southern Ry. v. Clift, 260 U.S. 316 (1922) 36
Steel v. Smelting Co., 106 U.S. 447 (1882) 72
Stoneroad v. Stoneroad, 158 U.S. 240 (1895) 69
Trbovich v. United Mine Workers, 404 U.S. 528 (1972) 27
United States v. Kagama, 118 U.S. 375 (1886) ... 68
United States v. State Investment Co., 264 U.S. 206 (1924) 74-75
Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) 90
Winters v. United States, 207 U.S. 564 (1908) 57, 64, 89
Wisconsin v. Illinois, 278 U.S. 367 (1929), *remedial measures considered*, 281 U.S. 179, *decree entered*, 281 U.S. 696 (1930), *decree temporarily modified*, 352 U.S. 945 (1956), 352 U.S. 983 (1957), *decree superseded*, 388 U.S. 426 (1967) 33, 34, 57
Arizona Power Pooling Ass'n v. Morton, 527 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) 175
City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978) 175
Conrad Investment Co. v. United States, 161 F. 829 (9th Cir. 1908) 52, 89
McRae v. United States, 420 F.2d 1283 (D.C. Cir. 1969) 31
Perkins v. Standard Oil Co., 487 F.2d 672 (9th Cir. 1973) 34
Seagraves v. Wallace, 69 F.2d 163 (5th Cir.), *cert. denied*, 293 U.S. 569 (1934) 36

Sekaquatewa v. MacDonald, 626 F.2d 113 (9th Cir. 1980) 72
Skeem v. United States, 273 F. 93 (9th Cir. 1921) 89
Stolberg v. Members of the Board of Trustees, 541 F.2d 890 (2d Cir.), *cert. denied*, 429 U.S. 485 (1976) 31
United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *on appeal from district court decision on remand*, 330 F.2d 897 (1964) ... 52, 89
United States v. Aranson, No. 77-2295 (9th Cir. Mar. 30, 1981), *withdrawn* (Apr. 17, 1981) 75
United States v. Hibner, 27 F.2d 909 (E.D. Idaho 1928) 89
United States v. Romaine, 255 F. 253 (9th Cir. 1919) 72
United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286 (9th Cir. 1981) 31, 54
United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939) 89
White v. Murtha, 377 F.2d 428 (5th Cir. 1967) ... 36
Cocopah Tribe of Indians v. Morton, Civ. No. 70-753-PHX-WEC (D. Ariz. May 12, 1975) 63, 292-94
Fort Mojave Tribe v. LaFollette, Civ. No. 69-324 MR (D. Ariz. Feb. 7, 1977) 59, 288-91
Nuclear Data, Inc. v. AEC, 344 F. Supp. 719 (N.D. Ill. 1972) 73
Pueblo of Taos v. Andrus, 475 F. Supp. 359 (D.D.C. 1979) 71
Wasserman v. Udall, 234 F. Supp. 651 (1964) 70
French v. United States, 49 Ct. Cl. 337 (1914) ... 71
Taylor v. Tempe Irrigating Canal Co., 21 Ariz. 574, 193 P. 12 (1920) 47

City of Los Angeles v. City of Glendale, 23 Cal. 2d 68, 142 P.2d 289 (1943) 47
Benson v. Burgess, 192 Colo. 556, 561 P.2d 11 (1977) 47

CONSTITUTIONAL PROVISIONS:

U.S. CONST., art. III, § 2, cl. 2 3
U.S. CONST., amend. XI 22, 25-26

STATUTES:

Administrative Procedure Act, 5 U.S.C. § 702 (1976) 73
25 U.S.C. § 175 (1976) 48
25 U.S.C. § 176 (1976) 68, 71
Leavitt Act, 25 U.S.C. § 386(a) (1976) 96
28 U.S.C. § 1362 (1976) 27
43 U.S.C. §§ 1, 2, 751, 752, 771, 772 (1976) 68, 69, 70
43 U.S.C. § 485g, h(c) (1976) 173, 174
Boulder Canyon Project Act, 43 U.S.C. § 617 (1976) 7, 8
Colorado River Basin Project Act, Pub.L.No. 90-537, § 301, 82 Stat. 887 (1968) (codified at 43 U.S.C. § 1521 (1976)) 39
Act of June 24, 1974, Pub.L.No. 93-320, 88 Stat. 266 ..... 68, 117, 281
Act of March 3, 1865, 13 Stat. 541 282
California Limitation Act, Act of Mar. 14, 1929 7

MISCELLANEOUS:

S. REP. No. 408, 90th Cong., 1st Sess. (1967) 39
42 Op. Att'y Gen. 441 (1972) 71

SECRETARIAL ORDERS:

Secretarial Order re: Western Boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation, Arizona, California and Nevada (June 3, 1974) 58-59, 286-87
Secretarial Order re: Quechan Indian Reservation Boundaries; Secretarial Determination and Directives, 46 Fed. Reg. 11372 (Feb. 6, 1981) 62, 297-303
Secretarial Order re: Western Boundary of the Colorado River Indian Reservation (Jan. 17, 1969) 61, 295-96

TEXTS:

EXECUTIVE ORDERS RELATING TO INDIAN RESERVATIONS: FROM MAY 14, 1855 TO JULY 1, 1912 (1912) 77-78, 82, 84
R. FIELD, B. KAPLAN & K. CLERMONT, CIVIL PROCEDURE (4th ed. 1978) 31
MOORE'S FEDERAL PRACTICE (2d ed. 1980) 31, 36
WATERS AND WATER RIGHTS (R. Clark ed. 1972) 47

PERIODICALS:

Burness, Cummings, Gorman & Lansford, *United States Reclamation Policy and Indian Water Rights*, 20 NAT. RESOURCES J. 807 (1980) 96, 97, 99
Clyde, *Special Considerations Involving Indian Rights*, 8 NAT. RESOURCES LAW. 237 (1975) 98
Meyers, *The Colorado River*, 19 STAN. L. REV. 1 (1966) 90
Price & Weatherford, *Indian Water Rights in Theory and Practice: Navajo Experience in the Colorado River Basin*, 40 LAW & CONTEMP. PROB. 97 (1976) 98
Ranquist, *The* Winters *Doctrine and How It*

Grew: Federal Reservation of Rights to the Use of Water, 1975 B.Y.U. L. REV. 639 ..... 95, 96
Shrago, *Emerging Indian Water Rights: An Analysis of Recent Judicial and Legislative Developments*, 26 ROCKY MTN. MIN. L. INST. 1105 (1980) 91
Note, *A Proposal for the Quantification of Reserved Indian Water Rights*, 74 COLUM. L. REV. 1299 (1974) 91
Note, *Indian Reserved Water Rights: The* Winters *of Our Discontent*, 88 YALE L.J. 1689 (1979) 95, 98

TABLE OF ABBREVIATIONS

Ariz. Exh.	Arizona's Exhibit
Calif. Exh.	California's Exhibit
CH. Exh.	Chemehuevi Indian Tribe's Exhibit
C.R. Exh.	Colorado River Indian Tribes' Exhibit
F.M. Exh.	Fort Mojave Tribe's Exhibit
F.Y. Exh.	Fort Yuma (Quechan) Tribe's Exhibit
S.P. Exh.	State Parties' Exhibit
U.S. Exh.	United States' Exhibit
Pr. Tr.	Transcript of the prior proceedings before Master Rifkind
Tr.	Transcript of the present proceedings before Master Tuttle
Pr. ___ Exh.	Exhibit of _____ admitted in prior proceedings before Master Rifkind

PART ONE

I. Statement of the Case

This case boasts a long, complex history of litigation over the rights to the waters of the Colorado River. The United States and the State Parties, a group of several western state and local governments and seven public agencies of California, participated in the earlier proceedings. In those proceedings the United States acquired water rights for five Indian Reservations. The United States now seeks to have those water rights increased. Seeking larger increases, the Tribes[1] have filed petitions to intervene.

The suit began in 1952 when Arizona filed a motion for leave to file a bill of complaint against California and seven public agencies of the state.[1.1] The complaint invoked the original jurisdiction of the Supreme Court under Article III, section 2, clause 2 of the United States Constitution. Arizona sought confirmation of her title to water in the Colorado River system, limitation of California's annual beneficial consumptive use of Colorado River system water at 4,400,000 acre-feet, and placing of a permanent injunction against assertion of claims inconsistent with Arizona's title.[2] Arizona brought her claims under the Colorado

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1. Colorado River Indian Tribes, Fort Mojave Indian Tribe, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and Fort Yuma (Quechan) Indian Tribe.

1.1. Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego and County of San Diego.

2. S. Rifkind, Report of the Special Master — Arizona v. California 1-2 (1960) [hereinafter cited without cross-reference as Special Master's Report]. As the prior Master noted, an acre-foot of water is water sufficient to cover an acre of land to a depth of one foot; that amount equals approximately 325,850 gallons. *Id.* at 1 n.5 (citing Pr. Ariz. Exh. 1000, at 17 (Pre-Trial Order)).

River Compact and the Boulder Canyon Project Act, 43 U.S.C. § 617 (1976). Nevada later intervened seeking a determination of her water rights. The United States also intervened seeking water rights on behalf of various federal establishments, including five Indian Reservations[3]—the Colorado River Indian Reservation, the Fort Mojave Indian Reservation, the Fort Yuma Indian Reservation, the Chemehuevi Indian Reservation, and the Cocopah Indian Reservation. In 1955 Simon Rifkind was appointed Special Master *vice* George I. Haight, deceased, and lengthy hearings and deliberations occupied the next several years.

In 1960, Master Rifkind filed his report recommending a certain division of the Colorado River waters and generally sustaining the United States' claims. His findings were substantially adopted by the Supreme Court in its 1963 opinion, 373 U.S. 546, and its 1964 Decree, 376 U.S. 340. In 1979, the Court issued a Supplemental Decree which set forth the various priorities to be attached to these earlier decreed water rights. 439 U.S. 419 (1979). The major questions in these earlier proceedings involved the division of water rights among the states and the priorities to be allocated to those water rights. The claims made by the United States for water rights to the five Indian Reservations were a relatively small part of the larger picture.

Most of the larger questions concerning water rights on the Colorado River were resolved by the 1964 and 1979 Decrees. These Decrees, however, left open the question of the final determination of some of the boundaries of the Indian Reservations. In addition,

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3. SPECIAL MASTER'S REPORT at 6. A map of these Reservations was introduced as Pr. U.S. Exh. 100.

prior to the issuance of the 1979 Decree, the Tribes filed motions seeking leave to intervene.[4] The Tribes and later the United States[5] claimed, in various amounts, water rights for additional acreage. Two types of claims were asserted: claims of water rights for acreage which was newly recognized as part of the Reservations within the newly-final boundaries, and claims of water rights for acreage which although recognized in 1964 as part of the Reservations was allegedly omitted from earlier consideration by error. On January 9, 1979, the Court appointed the undersigned as Special Master to consider the issues raised by these motions.[6]

Following the Court's appointment of a Master, the State Parties responded by alleging that neither type of claim could presently be litigated. The claims within the old boundaries were, according to the State Parties, precluded by *res judicata*. The claims based on the new boundaries were allegedly premature because the boundaries were not yet final with respect to the State Parties and, thus, this or other litigation must first establish that finality before a sufficient foundation is laid for the water rights claims. They also opposed many of the water rights claims on the merits. Moreover, they opposed in varying degrees the Tribes' participation in the proceedings.

Substantial evidence was received on these issues. The first trial session began on September 2, 1980 in the United States Courthouse at Denver, Colorado. Before the final trial session on April 7, 1981, the re-

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4. Motion of Chemehuevi, Fort Mojave and Quechan (Ft. Yuma) Tribes for Leave to Intervene (Dec. 1977); Motion of Colorado River and Cocopah Tribes for Leave to Intervene (Apr. 1978).

5. Motion of United States for Modification of Decree (Dec. 1978).

6. 439 U.S. 419, 436 (1979).

cord of evidence consisted of approximately 7,300 pages of testimony and several hundred exhibits.

From the record now assembled the questions presented by the parties can be answered. This Report addresses several issues including: (1) the propriety of intervention by the Tribes; (2) whether the boundaries to the Reservations have been finally determined; (3) whether the claims of water rights for lands omitted from the 1964 Decree are precluded by that Decree; and (4) whether the additional acreage merits a decree awarding additional water rights to the Indian Reservations.

In order to put these issues in context, it is necessary to focus on the earlier proceedings before the prior Master and the Court. Moreover, the adoption of various standards and methods in the earlier proceedings should substantially guide my present decision in this case.

A. *Prior Litigation*

1. *Special Master's Report of 1960*

On December 5, 1960, after lengthy trial proceedings, Master Rifkind filed his Report with the Court. The Special Master's Report provided for the division of the Colorado River water among the Lower Basin States and sustained the United States' claims for reserved water rights for several federal establishments, including claims made on behalf of the Indian Reservations in the lower Colorado River Valley. The dispute included controversies over both the mainstream and tributary water in the Colorado River system. The mainstream controversy is the most important for present purposes.

(a) *Division of Colorado River Water Among the States of the Lower Basin*

The States of the Colorado River Basin had entered into an agreement known as the Colorado River Compact. The basin was divided into two parts at a point on the River in northern Arizona known as Lee Ferry. The Upper Basin States and the Lower Basin States agreed that each basin would have annually 7,500,000 acre-feet of water from the Colorado River system, while the Lower Basin had "the right to increase its beneficial consumptive use of such waters by one-million acre-feet per annum." The States agreed that the Mexican Treaty obligation (set by treaty in 1944 at 1,500,000 acre-feet of water per annum), would be met by the surplus beyond the amounts specified above and, if there was not sufficient surplus, the deficiency should be borne equally by the two basins. In any event, the Upper Basin was not to deplete the flow of the River at Lee Ferry below a total of 75,000,000 acre-feet for any period of ten consecutive years.[7]

From this background, the interstate allocation of mainstream water in the Lower Basin proceeded. The authorities controlling this question were diverse. Master Rifkind concluded that "the claims of Arizona, California and Nevada to water from Lake Mead and from the mainstream of the Colorado River below Hoover Dam are governed by the Boulder Canyon Project Act, [43 U.S.C. § 617 (1976)], the California Limitation Act, Act of March 4, 1929, and the several water delivery contracts which the Secretary of the Interior has made pursuant to the authority vested in him by

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7. *See* SPECIAL MASTER'S REPORT at 138-51; 373 U.S. at 557-58.

Section 5 of the Project Act."[8] *See* 43 U.S.C. § 617(d). He found the Project Act to be "the source of authority for the allocation and delivery of water to Arizona, California, and Nevada from Lake Mead and from the Colorado River below Lake Mead."[9] He derived this authority of the Secretary of the Interior from his reading of several sections of the Project Act[10] as well as the legislative history of the Act. In addition, the California legislature had limited the amount of water that a state could divert annually.[11] One significant limitation on the Secretary's authority was that Section 6 of the Project Act requires the terms of the contracts to satisfy water rights perfected by June 25, 1929,[12] the effective date of the Project Act. *See id.* § 617(e). Master Rifkind viewed the Project Act as, thus, setting the terms for water unappropriated as of that date. Such water could, according to Master Rifkind, be made available for use within the state only if the Secretary should contract for the delivery of the water to that state.[13] Once the contracts were in force, the Secretary retained discretion to decide how much of this water could be consumed.[14] Of course, once the water was released for consumption, the Secretary was obliged to allocate certain quantities to each state.[15]

Under these authorities, Master Rifkind found the division of water rights among these three states. He found California limited annually to 4,400,000 acre-

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8. SPECIAL MASTER'S REPORT at 138.
9. *Id.* at 151-54.
10. *Id.* at 151-64.
11. *Id.* at 166 & n.27.
12. *Id.* at 152 & n.20.
13. *Id.* at 152-53.
14. *Id.* at 221-37.
15. *Id.* at 222.

feet of consumptive use[16] of the first 7,500,000 acre-feet of water stored in Lake Mead and flowing in the mainstream from Hoover Dam.[17] He found that the Secretary effectively contracted with the three states or entities within those states. Under these contracts, Arizona was entitled to an annual share of 2,800,000 acre-feet of consumptive use of water. California agencies were entitled under contract to 5,362,000 acre-feet of consumptive use per year, subject to the limitation that the Master found elsewhere which restricted California's share to 4,400,000 acre-feet annually. Nevada was entitled to 300,000 acre-feet.[18] The water in excess of 7,500,000 acre-feet, he found, belonged 50% to California and 50% to Arizona, unless the Secretary contracted with Nevada to allocate 4% of the surplus to Nevada at the expense of Arizona.[19] In event of a shortage, below 7,500,000 acre-feet in a year, the states were to receive a proportional allocation based on their respective shares of the first 7,500,000 acre-feet.[20] Water rights perfected under state law or reserved under federal law before June 25, 1929, the effective date of the P ject Act, were titled "present perfected rights"[21] and re to be satisfied first in any event.[22] Thus, rights in existence at the time of the Project Act

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16. As used by the Special Master and the Court, the phrase consumptive use means the diversions from the river less any return flow available for consumptive use in the United States or in satisfaction of the Mexican Treaty obligation. For the definition as adopted in the Court's decree, see 376 U.S. at 340.

17. SPECIAL MASTER'S REPORT at 167-94.

18. *Id.* at 201-10, 221-47.

19. *Id.* at 224-25.

20. *Id.* at 233.

21. *Id.* at 306-11. For the definition as adopted in the Court's decree, see 376 U.S. at 341.

22. SPECIAL MASTER'S REPORT at 306-07.

were protected. Master Rifkind further concluded that "[a]ll consumption of mainstream water within a state is to be charged to that state, regardless of who the user may be."[23]

(b) *United States Claims on Behalf of Five Indian Reservations*

The prior Special Master sustained the claims made by the United States on behalf of the Indian Reservations to the extent of approximately 900,000 acre-feet of annual diversions of water from the Colorado River.[24]

The Master found that the United States has the power to create a water right appurtenant to Reservation lands without complying with state law. *Winters v. United States*, 207 U.S. 564 (1908). The reservation of water rights is effective as of the date of the creation of the Reservation, without regard to subsequent appropriative use. The United States may create such a Reservation by Executive Order and effectively reserve such water rights.[25]

An implied intent to reserve water rights for Indian lands is sufficient. Such an intent is not difficult to find for desert Reservations because otherwise the land given the Indians would be virtually useless and incapable of sustaining life. By this reasoning the Master found an intent on the part of the United States to reserve water for the five Indian Reservations.[26]

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23. *Id.* at 247.
24. *Id.* at 257.
25. *Id.* at 257-59.
26. *Id.* at 259-60.

The Master further found that the reservation of water was not limited to current needs but rather extended to future agricultural and related uses. The reservation of water was thus intended to be established at the creation of the Reservations. It was not dependent upon the acquisition of appropriative rights under state law. Any other conclusion would subject the Indians to a competition for water with the white settlers. In competition with the whites the Indians, by their lack of farming experience, would surely lose. The Master found that result to be inconsistent with the intention to convert the Indians to an agricultural economy. Thus, in order to accommodate future growth on the Reservations the United States intended to reserve enough water to meet expanding needs despite state water law.[27]

In determining the quantity of water reserved, the Master settled on the now-familiar formula: the United States reserved "enough water to irrigate all of the *practicably irrigable lands* on a Reservation and that the water rights thereby created would run to defined lands."[28]

In reaching this conclusion, the Master rejected other possible methods of determining quantity. He specifically rejected attempts to tie the quantity to the actual or expected number of Indians living on the Reservation because if the water rights grew with the Indian population the junior water rights would be uncertain. Similarly, if the water rights were fixed to accommodate present uses, the Indians' growth would be stifled. Conversely, if the water rights were based on future predicted needs, a hazardous, and probably in-

27. *Id.* at 260-62.
28. *Id.* at 263 (emphasis added).

correct, prediction would be required about the future needs.[29]

Further, the Master found that the water rights may be utilized regardless of the identity of the particular user. He specifically mentioned the possibility of leasing lands with water rights to non-Indians.[30]

Finally, for each Reservation, he found that for the benefit of the Indians the United States has the right to a annual maximum diversion of a specified number of acre-feet of water from the Colorado River or the quantity of water necessary to supply the consumptive use of irrigation of a specified number of acres and for the satisfaction of related uses, whichever is less. He also found priority dates for these water rights.[31] In arriving at his conclusion with respect to irrigable acreage, he found it necessary to resolve certain boundary disputes regarding the Fort Mojave and Colorado River Indian Reservations.[32]

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29. *Id.* at 262-65.
30. *Id.* at 266.
31. *Id.* at 267-87.
32. *Id.* at 274-78, 283-87.

Indian Water Rights Recommended by Master Rifkind

	Acre-Feet Diversion	Acres	Priority Date
Chemehuevi	11,340	1,900	2/2/1907
Cocopah	2,744	431	9/27/1917
Ft. Yuma	51,616	7,743	1/9/1884
Colorado River	717,148	107,588	3/3/1865 11/22/1873 11/16/1874 5/15/1876 11/22/1915*
Ft. Mojave	122,648	18,974	9/18/1890 2/2/1911*
Total	905,496	136,636	——

*The Master did not specify the acres to be given these priorities because the evidence did not permit such a finding.[33]

2. *Supreme Court Opinion on the Special Master's Findings*—Arizona v. California, *373 U.S. 546 (1963)*

The Supreme Court generally upheld the Master's findings as to the division of the Colorado River water among the States and as to the reservation of water for federal establishments.

With respect to the allocation of water among the States, the Court had few difficulties with the Master's conclusions. The significant differences resulted in an increase in the discretionary power accorded the Secretary. The Secretary was allowed, without regard to state law, to determine the intrastate allocation of water under the Project Act by deciding with whom to contract within a state and what the priorities are for various intrastate uses. 373 U.S. 585-90. Moreover, in

33. *Id.* at 274 n.33, 283 n.57.

the event of a shortage of water, the Secretary was given broad discretion to allocate the remaining water. *Id.* at 592-94. At this point, the Court noted the Secretary's statutory obligation to respect "present perfected rights" as of the date the Act was passed. *Id.* at 594. Finally, the Secretary was allowed to charge Nevada and Arizona for diversions above Lake Mead up to Lee Ferry, the beginning of the Lower Basin of the Colorado River. *Id.* at 590-91.

The Court similarly adopted the majority of the Master's decisions respecting the reservations of water for federal establishments. The Indian Reservations issue attracted the greatest attention among these. The Court found that the United States has the power to reserve water rights for Indian Reservations, *id.* at 597-98, and that the United States implicitly intended to exercise that power with respect to the five Indian Reservations. *Id.* at 598-600. Thus, the Court held that these water rights having vested before the Act became effective on June 25, 1929, were "present perfected rights" entitled to priority under the Act. *Id.* On the issues of quantity the Court further upheld the Master's findings that the rights were reserved for future use, that the rights should be measured by the water required to irrigate the practicably irrigable acreage, and that the number of acres found to be practicably irrigable was reasonable. *Id.* at 600-01.

On one point the Court disagreed with the Master. It felt that he should not have determined the disputed boundaries of two of the Indian Reservations. Finding it unnecessary to resolve those issues, the Court left these disputes to future resolution.[34] *Id.* at

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34. In its opinion the Court appeared to suggest that this was a *title* dispute and that the Secretary had some discretion in any event to de-

601. Because the Court had agreed with the Master's finding on the number of irrigable acres on the Reservations, the Court's holding with respect to boundaries meant that only those irrigable acres found by the Master to be within the Reservations' boundaries were to receive water rights.

The legal directives to implement the principles of the 1963 opinion were delayed to allow the recommended decree to be amended to accommodate minor points on which the Court disagreed with the Special Master. *Id.* at 602.

3. *The 1964 Decree*—Arizona v. California, *376 U.S. 340 (1964)*

In 1964, the Court issued a decree implementing the findings of its 1963 Opinion. This 1964 Decree substantially settled the water rights among the states, as well as the water rights of the Indians to water from the states' allotments. But some matters were clearly left open by this Decree.

The 1964 Decree carried out its purpose in the form of an injunction. The United States and its operatives were enjoined to release the Colorado River mainstream water only in specified allotments that tracked the findings of the 1963 Opinion.

The division in Article II among the Lower Basin states provided the basis of the Decree. If the mainstream water downstream from Lee Ferry equalled 7,500,000 acre-feet of water for annual consumptive

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liver water to the disputed areas. *See* 373 U.S. at 601. When the 1964 Decree set a fixed quantity for diversions, the Court stated that the quantities then fixed could be adjusted by decree or agreement if the *boundaries* were finally determined. 376 U.S. at 345. This subject is more fully addressed later. *See* Part One at II.B. *infra*.

use: 2,800,000 was to go to Arizona, 4,400,000 was to go to California, and 300,000 was to go to Nevada. Water in excess of 7,500,000 acre-feet was to be shared equally by California and Arizona unless the United States contracted with Nevada to give 4% of the excess to that state out of Arizona's share. If the water supply was less than the annual consumptive use of 7,500,000 acre-feet, then the Secretary of the Interior was directed to satisfy "present perfected rights," (which included the Indian water rights), "in order of their priority dates without regard to state lines." *Id.* at 342.

The Indian Reservation water rights and their priority dates were set forth later in Article II. The United States was directed to release water to federal establishments only in accordance with the allocations specified. The Decree then specified the diversions in acre-feet of water, number of irrigable acres and priority dates determined by the Master. Each Reservation was to receive either the diversions specified or the consumptive use of water necessary to serve the acres found irrigable, whichever amount was less.

The 1964 Decree lacked a full listing of the "present perfected rights" and their priority dates. The Indian water rights were specified to some degree,[35] but the other "present perfected rights," later known in the 1979 Decree as "miscellaneous present perfected rights" remained unspecified. Article VI thus provided that:

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35. In the 1979 Decree the Indian water rights were again spelled out and each acre-foot of water was then matched with a priority date. 439 U.S. at 423, 428, 436. Due to evidentiary problems this match was not possible at the time of the 1964 Decree. *See* note 33 and accompanying text *supra*.

> Within two years[36] from the date of this decree, the States of Arizona, California, and Nevada shall furnish to this Court and to the Secretary of the Interior a list of the present perfected rights, with their claimed priority dates in waters of the mainstream within each State, respectively, in terms of consumptive use, except those relating to federal establishments. Any named party to this proceeding may present its claim of present perfected rights or its opposition to the claims of others. The Secretary of the Interior shall supply similar information, within a similar period of time, with respect to the claims of the United States to present perfected rights within each State. If the parties and the Secretary of the Interior are unable at that time to agree on the present perfected rights to the use of mainstream water in each State, and their priority dates, any party may apply to the Court for the determination of such rights by the Court.

376 U.S. at 351-52. The determinations envisioned in Article VI were extremely important because the amounts and dates set under that article would determine the quantities of water and order of priority in times of shortage. Such "present perfected rights" would take priority over any junior rights. Similarly, the non-Indian claims to be classified as "present perfected rights" could take priority over Indian claims if given a priority date that predated the establishment of an Indian Reservation.

In closing, the Court, following the recommendation of the Master, included a provision, Article IX, recognizing the non-final nature of the 1964 Decree:

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36. This period of time was amended on February 28, 1966, to allow three years from March 9, 1964, for a determination of prior perfected rights and priority dates. 383 U.S. 268 (1966).

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

Id. at 353.

4. *Completing the Priority System Through Article VI of the 1964 Decree: The 1979 Decree*—Arizona v. California, *439 U.S. 419 (1979)*

The deadline set in Article VI for determining priorities was not met by the parties. Over several years the State Parties and the United States unsuccessfully attempted to fashion a list of present perfected rights with priority dates and a decree to implement the mandate of Article VI for a complete list of priority of claims to present perfected rights including all such state and federal claims.

Because of the parties' inability to agree upon the "present perfected rights" and their priority dates, the State Parties in May, 1977, filed with the Court a joint motion for determination of those rights and for entry of a supplemental decree.[37] The United States, in November, 1977, responded with a motion objecting to parts of the supplemental decree proposed by the State Parties.[38] Later these initially-opposed forces found themselves in agreement over these matters and on May 30, 1978, filed a joint motion for a supplemen-

37. Joint Motion for a Determination of Present Perfected Rights and the Entry of a Supplemental Decree (May 1977).

38. Response of the United States (Nov. 1977).

tal decree under Article VI, including a listing of rights and priority dates.[39] The parties in agreement, comprising a group of all named parties, applied to the Court for entry of the supplemental decree "in order to avoid future controversies."[40]

On January 9, 1979, the Supreme Court entered a supplemental decree as requested by the then-existing parties. Arizona v. California, 439 U.S. 419 (1979).

That Supplemental Decree established the priority of water rights in the event of an insufficient water supply (*i.e.*, less than 7.5 million acre-feet annually). Under that Decree the Indian water rights, as present perfected rights, were explicitly given general priority over the major water rights of the State Parties. This preference for Indian water rights included any rights associated with expanded-recognized boundaries. But with respect to "miscellaneous present perfected rights," listed in this Decree, the order of priority was to be determined by "priority date." And the Indian water rights and the "miscellaneous present perfected rights" were listed in this 1979 Decree with the acre-foot entitlements matched with their respective priority dates. *Id.* at 423-36. Thus, the work outlined in Article VI had been completed.

The 1979 Decree also contained several limitations on its scope. It specifically stated that:

> (1) The following listed present perfected rights relate to the quantity of water which may be used by each claimant and the list is not intended to limit or redefine the type of use set forth in [the 1964] Decree;

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39. Joint Motion for the Entry of a Supplemental Decree (May 1978).
40. *Id.* at 23.

(2) This [1979 Decree] shall in no way affect future adjustments resulting from determinations relating to settlement of the Indian reservation boundaries referred to in Art. II(D)(5) of [the 1964] Decree [boundaries to the Colorado River and Fort Mojave Indian Reservations];

(3) Article IX of the [1964 Decree] is not affected by this list of present perfected rights;

(4) Any water rights listed . . . may be exercised only for beneficial uses.

439 U.S. at 421.

B. *Present Proceedings*

The 1979 Decree resolved major issues in the litigation. But before that Decree was entered new questions arose. The five Indian Tribes followed by the United States made claims for additional water rights to Reservation lands.

The Indian Tribes previously had no part in the litigation. The United States had represented them. Then in December of 1977, the Fort Mojave, Chemehuevi and Quechan (Ft. Yuma) Indian Tribes moved for leave to intervene as indispensable parties.[41] On April 7, 1978, those three Tribes, apparently joined by the Colorado River Indian Tribes,[42] filed a petition

41. Motion for Leave to Intervene as Indispensable Parties (Dec. 1977).

42. The Colorado River Indian Tribes did not wish to join in this motion. The State Parties response to this petition notes that the Tribes had noted that they did not join in this motion and asked that their name be removed from the pleadings. Response of State Parties to Petition of Intervention 5 n.1 (May 1978). *See* Letter from Franklin McCabe,

for intervention.[43] Then on April 10, 1978, the Colorado River Indian Tribes and the Cocopah Indian Tribe filed a motion for leave to intervene and a petition for intervention.[44]

The Fort Mojave, Chemehuevi, and Quechan Indian Tribes sought in their intervention to oppose entry of the 1979 Decree that was to set the priority order for water rights in the Colorado River. The Petition of the Cocopah and Colorado River Indian Tribes did not seek to oppose the entry of the Decree.

Both groups of Indians raised claims outside the scope of the Article VI determinations intended to be embodied in the 1979 Decree. They sought to intervene because they felt the United States could not adequately represent their interests. All five Tribes, in essence, claimed entitlement to water rights appurtenant to two types of land: (1) boundary land — land that was or should have been officially recognized for the first time as a part of the Reservations; and (2) omitted lands — irrigable lands, within the recognized 1964 boundaries of the Reservations, for which the United States failed to claim water rights in the earlier litigation. The motion filed by the Fort Mojave, Chemehuevi, and Quechan Tribes claimed that these issues could be raised because of the inadequate prior representation of the United States. The Cocopah and Colorado River Indian Tribes alleged that the omitted lands claim was open to relitigation, because of inadequate representation, but with respect to that claim and the boundary lands claim these two Tribes also

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Jr., Chairman, Tribal Council of Colorado River Indian Tribes, to Clerk of the Court (May 10, 1978).

43. Petition of Intervention (Apr. 7, 1978).

44. Motion for Leave to Intervene and Petition of Intervention (Apr. 10, 1978).

found support in the 1964 Decree's Article IX which permitted amendment of the Decree's provisions. These two Tribes also noted that the 1964 Decree specifically left open the boundary lands question regarding the Colorado River Indian Reservation.

Before the entry of the supplemental decree, the State Parties and the United States filed papers which opposed these motions to intervene. The United States initially argued against intervention by the Fort Mojave, Chemehuevi, and Quechan Tribes because: (1) it adequately represented the Indians; (2) the then-proposed decree which was offered under Article VI of the 1964 Decree fully protected the Indians; (3) the omitted and boundary lands claims could be brought later under Articles II and IX of the 1964 Decree.[45] But later, the United States stated that it would not oppose intervention after a Decree on Article VI was entered.[46] The State Parties argued that intervention by these three Tribes should be denied because: (1) intervention would authorize a suit by the Tribes against the states in violation of the Eleventh Amendment; (2) any claims for additional water rights should be brought under Articles II and IX; and (3) the Indians did not meet the conditions for either permissive intervention or intervention as of right — mainly due to the untimely application.[47] Subsequently, the four California urban agencies[48] filed a response separate from the other State Parties opposing the substantive

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45. Memorandum of United States (Feb. 1978).

46. Memorandum of United States (May 1978).

47. Response of State Parties to the Fort Mojave, Chemehuevi, and Quechan Tribes' Motion for Leave to Intervene as Indispensable Parties (Jan. 1978).

48. The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego.

claims of all five Tribal groups to any additional water rights but not opposing intervention of the Colorado River and Chemeheuvi Tribes if the Tribes had independent counsel and if the entry of the 1979 Supplemental Decree would not be delayed.[49] Moreover, those agencies did not oppose litigation of the boundary lands question if they were permitted to challenge the correctness of the characterization of these lands as Reservation lands. California and Nevada, joined by two water districts, filed a response consenting to intervention of the Colorado River and Cocopah Tribes if: (1) the United States did not oppose intervention; (2) the Supplemental Decree was entered promptly, at least concurrent with a grant of intervention; (3) intervention was limited to the purpose of adjudicating only the claims of additional water rights under Articles II and IX (apparently including water rights claims for boundary and omitted lands); (4) the Indians were represented only by individual counsel; (5) the intervention was permissive and not as a matter of right.[50] Arizona later filed a response apparently opposing any intervention.[51]

Then on December 22, 1978, the United States moved for entry of a Supplemental Decree to grant additional water rights for boundary lands and omitted lands.[52] That memorandum recommended that the matter be referred to a Special Master. But the United

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49. Response of the Urban Agencies to Motion of Colorado River Indian Tribes and Cocopah Indian Tribe for Leave to Intervene and Petition of Intervention (June 1978).

50. Response of California and Nevada to the Cocopah and Colorado River Tribes' Motion (June 1978).

51. Response of Arizona to the Cocopah and Colorado River Tribes' Motion (June 1978).

52. Motion of United States for Modification of Decree and Supporting Memorandum (Dec. 1978).

States, wanting to limit the issues to be examined by the Special Master and to avoid unnecessarily protracted hearings, suggested that the Court lay down the following governing principles:

> (1) That the claims advanced in respect of "boundary lands" are now ripe for adjudication, and that this Court (and therefore its Master) will not undertake to review in these proceedings the correctness of the boundary adjustments which have been settled or accepted by the Secretary of the Interior, nor to decide any title disputes affecting particular parcels within a Reservation;
>
> (2) That the entitlement of any Reservation to additional mainstream diversions on account of boundary adjustments is determined in accordance with the standard and the formulae utilized by the Court in its original decision;
>
> (3) That, accordingly, the only task of the Special Master in relation to the claims made for "boundary lands" is to make findings as to the "practicably irrigable" acreage comprised within the restored areas and to recommend additional mainstream diversions by applying the acre-feet per acre ratios already established for each Reservation;
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> (4) That the claims in respect of "omitted lands" are not foreclosed and must be determined on their merits;
>
> (5) That additional diversions on account of areas not before considered should be determined in accordance with the standard and the formulae previously established;
>
> (6) That, accordingly, the only task of the Special Master in relation to the claims made for "omitted lands" is to make findings as to the "practicably irrigable" acreage comprised within the areas omitted from consideration during the original proceedings and to recommend addi-

tional mainstream diversions by applying the acre-feet per acre ratios already established for each Reservation.[53]

The State Parties responded that the omitted lands question was subject to the principles of *res judicata* and none of the boundaries under consideration had been finally determined, making the correctness of the purported boundaries to be an issue ripe for adjudication for the purpose of resolving water rights claims.[54]

The 1979 Decree followed the recommendations of the State Parties and the United States in setting the priority rights to the water. Moreover, in that Decree, the Court denied the motion of the Fort Mojave, Chemehuevi, and Quechan Tribes to intervene insofar as they sought to oppose entry of the Supplemental Decree. Recognizing that other matters raised by this motion, the Colorado River and Cocopah motion, and the United States' motion were unresolved, the Court referred these motions to the undersigned, as Special Master.[55]

The State Parties, although not always in complete agreement among themselves, generally adopted positions similar to those taken in their motions to the Court.[56] Accordingly, on March 29, 1979 I presented to

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53. *Id.* at 33-35.

54. Response of State Parties to Motion for Modification of Decree (Feb. 1979).

55. 439 U.S. 419, 436 (1979); 440 U.S. 942 (1979).

56. Arizona, California, and Nevada stated that the 11th Amendment barred intervention without their consent. California and Nevada would have given their consent upon certain conditions. Arizona unconditionally refused to consent. The three states and the Coachella Valley County Water District stated that the Reservation boundaries should now be finally determined by the Master. Memorandum of the States of Arizona, California, and Nevada and the Coachella Valley County Water District Regarding Certain Preliminary Issues (Apr. 1979). The four Cali-

the parties and the movants for intervention three questions to be briefed and argued orally:

(1) Have "the boundaries of the respective [Indian] reservations . . . [been] finally determined" within the meaning of Art. II(D)(5) of the March 9, 1964 Decree, 376 U.S. 340?

(2) Does the Eleventh Amendment bar intervention in this suit by the Indian Tribes without the consent of the State Parties?

(3) Is there a procedure whereby the Indian Tribes may appear and participate as if they were parties pending a ruling on their motions to intervene?

After conducting a hearing on these preliminary issues, I entered a memorandum and report on August 28, 1979, granting the Indian Tribes leave to intervene in the subsequent hearings on the merits.[57]

In granting the Tribes leave to intervene, I followed the guidance of Rule 24 of the Federal Rules of Civil Procedure. I concluded that the Indian Tribes should be permitted to intervene because the Tribes' direct pecuniary interests will be determined by this litigation and because the asserted claims of the government's conflict of interest created the possibility that the government's representation of the Tribes' interest

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fornia urban agencies adopted California's view of the 11th Amendment and the intervention issues. They also stated that the boundaries were not yet finally determined and that I should now adjudicate title to all such areas with all interested persons joined as parties. In the alternative they asked that the United States bring suit to quiet title to the land and water rights in federal district court. Memorandum of the Urban Agencies re Indian Reservation Boundary Question (Apr. 1979).

57. Memorandum and Report on Preliminary Issues (Aug. 28, 1979). Each of these issues is discussed in more detail in my 1979 Report.

"may be" inadequate. *See, e.g., Trbovich v. United Mine Workers,* 404 U.S. 528 (1972).

I further concluded that the States' Eleventh Amendment immunity was not implicated by the Tribes' motion to intervene. Because the intervenors' claims are ancillary to a case or controversy already within the Supreme Court's jurisdiction, *see, e.g., Aldinger v. Howard,* 427 U.S. 1, 6-14 (1976); *Freeman v. Howe,* 24 U.S. (24 How.) 450 (1861), they are within the scope of the State's constitutional surrender of immunity. *See, e.g., Principality of Monaco v. Mississippi,* 292 U.S. 313 (1934). In its 1964 Decree, the Court retained its exclusive jurisdiction over the distribution of the waters of the lower Colorado River and thus the present case provides the sole vehicle by which the Indian Tribes can assert their claims. 376 U.S. at 341-46, 353. In the alternative, I concluded that 28 U.S.C. § 1362[58] is a congressional abrogation of the State's immunity. *Moe v. Confederate Salish & Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463 (1976). My decision permitting the Indian Tribes to intervene obviated the need to consider alternatives to intervention.

I also concluded that the facts regarding irrigability of both the boundary and omitted lands should be presented. For the purpose of the determination of Reservation water rights in this litigation, I found the

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58. This statute provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe. . . wherein the matter in controversy arises under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1362 (1976). It is clear that § 1362 does not withdraw the Supreme Court's jurisdiction over Indian claims in cases in which a state is a party, but merely confines federal question claims by Indian Tribes to federal courts in general. 439 U.S. 419, 436-37 (1979).

boundary determinations made by the district courts and by the Secretary of the Interior to be final. I initially deferred decision on the omitted lands question but have since concluded that those claims are not barred by *res judicata* or related doctrines. The rationales underlying the determinations are explained in some detail below. *See* Part One at II.B. *infra*.

Following determinations made in the 1979 preliminary report, the parties, including the five Indian Tribes,[59] thoroughly litigated the issues in this case. Based on the evidence received in these hearings, I now make my findings.

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59. Since the early stages of the present proceedings, the alignment of the positions of the Tribes has altered substantially. As the hearings commenced, the Colorado River Indian Tribes, Fort Mojave Indian Tribe, Chemehuevi Indian Tribe, and Cocopah Indian Tribe have presented a united front by filing briefs jointly and the first three groups retained the same expert witnesses. For convenience these Tribes will be referred to as the Four Tribes. The remaining Tribe is the Quechan Tribe of the Fort Yuma Indian Reservation, a Tribe which has often asserted what appear to be separate views but which in fact were later adopted to some extent by the other Tribes.

II. Types of Claims to be Considered

Two basic types of water rights claims have been alleged by the United States and the Tribes. The difference is found in the character of land to which the rights are claimed to be appurtenant. First, there is land which was acknowledged at the time of the earlier proceedings to be within the Reservations. Second, there is land that since that time has either been added to the Reservations or recognized now to be within the boundaries of the Reservations. The parties have generally labelled these claims respectively as "omitted lands" claims and "boundary lands" claims in reference to the type of land with which the claims are associated. The State Parties have with respect to each sort of claim raised defenses which would cut short the water rights inquiry at various points. I find little merit in the State Parties' arguments and believe that for both types of lands the arguments should proceed to a determination of the quantity of water for these acres.

In connection with a discussion of the reasons for such decisions, I should note that several related arguments have been raised by either the State Parties or the Tribes and might profitably be discussed in this context because these points also concern the number of acres properly held to be within the Reservations and, thus, eligible for water rights.

A. Omitted Lands—Preclusion

Since the filing of the motions for modification of the decree, the State Parties have opposed any litigation over water rights to the so-called "omitted lands" for which water rights might have been claimed in the

litigation preceding the 1964 Decree. The prior determination of Indian water rights in that Decree, the State Parties claim, precludes relitigation of that issue by the United States. Although the Indians were not parties to that litigation, the State Parties contend that adequate representation of the Indians' interests by the United States would preclude assertion of the omitted lands claims by the Indians. *See Heckman v. United States,* 224 U.S. 413, 445-46 (1912). Drawing from these principles the State Parties have moved for dismissal of these omitted lands claims pressed by the United States and the Indians.[1]

The Tribes and the United States urge that the 1964 Decree understates the Tribes' rights and should be corrected. The evidence in the record convinces me that the prior decree is significantly in error on this point. I conclude that the Court has the power to reach these claims and should exercise that power to determine the substantive merits of those claims.

If these claims were presented in a proceeding separate from the original case, they would have been subject to the normal rules of preclusion. Contrary to the suggestions by some parties,[2] the water rights for the omitted lands are not new claims, separate from

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1. Motion to Reject the "Omitted Lands" Claims of the United States and the Intervening Indian Tribes and Memorandum of Points and Authorities in Support of Motion Filed on Behalf of the Metropolitan Water District of Southern California (Jan. 1981) [hereinafter cited as Memorandum of Metropolitan Water Memorandum]; State Parties' Motion and Memorandum of Points and Authorities re the Doctrine of Res Judicata (Mar. 1981) [hereinafter cited as State Parties' Memorandum on Res Judicata].

2. Four Tribes' Opening Post-Trial Brief 109 (May 1981); *cf.* Four Tribes' Pre-Trial Brief 5-8 (Aug. 1980); United States' Pre-Trial Brief 16 (Aug. 1981); United States' Opening Post-Trial Brief 22-23, 23 n.18 (May 1981).

the claims pressed in the prior proceeding. The claim in the original case, when properly described, embraced the totality of water rights for the Reservation lands. The failure of the United States to present evidence regarding the particular acres now referred to as the omitted lands does not mean that claims regarding such lands constitute new claims made by either the United States or the Tribes. Similarly it is not a new issue either, because the total amount of practicably irrigable land was litigated and determined in the earlier proceeding. Under these circumstances, the normal rules of and exceptions to preclusion would apply to additional water rights claims presented in a separate action. *See United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1301-09 (9th Cir. 1981). Such considerations, however, are not completely applicable to the present situation where the claims are presented in the same action in which the prior claims were adjudicated.

If a party properly moves the rendering court in the same proceeding to correct or modify its judgment, *res judicata* and collateral estoppel do not apply. *Stolberg v. Members of the Board of Trustees*, 541 F.2d 890, 893 (2d Cir.), *cert. denied*, 429 U.S. 485 (1976); *McRae v. United States*, 420 F.2d 1283, 1286 (D.C. Cir. 1969); 1B MOORE'S FEDERAL PRACTICE ¶ 0.407, at 931-35 (2d ed. 1980); R. FIELD, B. KAPLAN & K. CLERMONT, CIVIL PROCEDURE 860 (4th ed. 1978). In such a case there is no final judgment from a separate action which should be accorded such preclusive effect. The proper inquiry then concerns whether there exists a procedure allowing the Court to consider the request. The present case turns upon the proper interpretation of Article IX of the 1964 Decree which provides that:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

376 U.S. at 353. This provision, not the rule of *res judicata*, determines the ability of the Court to examine the omitted lands claims.

The definition of the power reserved by Article IX presents a difficult task. Its history and the proceedings before the prior Master are not conclusive and would support either a broad or narrow interpretation. The State Parties urge that the Master sought to recommend that the Court grant a final and fixed quantity of Indian water rights in order to allow the other parties the certainty required for planning.[3] For example, some of the remarks of the Master indicate that he might be disinclined to allow the United States to use Article IX to correct an error in the Indian water rights determination.[4] On the other hand, some statements in the earlier proceedings indicate that Article

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3. SPECIAL MASTER'S REPORT at 264 ("Financing of irrigation projects would be severely hampered if investors were faced with the possibility that expanding needs on an Indian Reservation might result in a reduction of the project's water supply."). *See also id.* at 264-66.

4. The State Parties cite the Master's references in his report to fixed quantities of Indian water rights, *see* note 3 *supra*, and his statements in the hearings indicating that the United States would be "bound" by the claims it then made. *See* Pr. Tr. 14155. Although these statements by the prior Master tend to make the intended point, I find closer to the mark an immediately subsequent exchange between the Master and United States counsel. After the Master told counsel that he was bound, counsel responded that, if there was a mistake in the Indian water rights claims, the United States would later "ask for leave to correct it." This suggestion was plainly rebuffed by the Master. Pr. Tr. 14156-57.

IX was desired to allow generally for the correction of virtually any error.[5] Perhaps all that can conclusively be drawn from the history of Article IX is that the provision itself is not explicitly referenced to the request of the United States to leave the Indians' water rights in an open-ended state.[6] Finding no clear resolution of this matter in the provision's history, I must turn to other sources.

Outside authority provides some limited guidance. Provisions virtually identical to Article IX can be found in other interstate water cases in the original jurisdiction of the Court. *See, e.g., Wisconsin v. Illinois*, 278 U.S. 367 (1929), *remedial measures considered*, 281 U.S. 179, *decree entered*, 281 U.S. 696 (1930), *decree temporarily modified*, 352 U.S. 945 (1956), 352 U.S. 983 (1957), *decree superseded*, 388 U.S. 426 (1967); *New Jersey v. New York*, 283 U.S. 336, *decree entered*, 283 U.S. 805 (1931), *modified*, 347 U.S. 995 (1954). But such cases do not directly speak to the present issue of preclusion. Rather, they merely illustrate that the Court may make even major modifications of decrees in cases over which it has retained jurisdiction.

The State Parties argue that all such cases involved the concept of equitable apportionment which fre-

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5. A provision such as Article IX was urged upon the Court by one of the State Parties to avoid "the possible claim that this Court may not alter or modify its rulings herein on the basis that the Decree is res adjudicata of the issues sought to be considered or reconsidered" because the Court "should not desire to find itself embarrassed by a provision in the Decree or ruling if the United States or parties can later convince this Court that this Court's determination has been erroneous or unworkable." Supplement and Amendment to Imperial Irrigation District's Form of "Decree of Court as Heretofore and Herewith Submitted" 11 (Dec. 1963).

6. *See* Pr. Tr. 12456-69, 13508.

quently alters the parties' rights in light of changed circumstances.[7] Considering that the present case does not concern such a concept, they conclude that Article IX is limited "to correction of a genuine mistake of fact such as a mathematical miscalculation by parties to the prior proceedings."[8] I question whether all those cases concerned equitable apportionment. *See Wisconsin v. Illinois*, 278 U.S. 367 (1927). Moreover, despite the inapplicability of the concept of equitable apportionment to the present case, the Court adopted the present Article IX which is equally as broad as the provisions used in the previous interstate water cases. Had the Court intended to impose the limits urged by the State Parties the language might have been tailored to fit those limits. A provision for the correction of merely clerical errors, such as that envisioned by the State Parties, would also seem entirely superfluous because a court normally possesses the inherent power to correct its decrees in such a manner. *See Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1968); *Perkins v. Standard Oil Co.*, 487 F.2d 672, 674 (9th Cir. 1973). The State Parties' view that Article IX incorporates the normal aspects of *res judicata* appears unduly restrictive because it renders that provision almost meaningless.

The best indicator of the scope of Article IX is thus its very language. On its face Article IX would permit very broad modifications of the 1964 Decree. Certainly it contains no limiting language. In the absence of

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7. *See* Memorandum of Metropolitan Water District 27-30 (Jan. 1981).

8. Memorandum of Metropolitan Water District 29 (Jan. 1981). *Cf.* State Parties' Memorandum on Res Judicata 17-18 (Mar. 1981) (mistakes of the kind under consideration not correctable by use of Article IX); Trial Brief of Nevada on Res Judicata 11-16 (May 1981).

more convincing arguments, I believe that the Court, by employing a broadly-drafted Article IX, retained the power to make virtually any modification in its 1964 Decree that it deemed proper "in relation to the subject matter in controversy."

Such a conclusion does not mean that any wide-ranging amendment would be made. I believe that the prior definition of water rights based on "practicable irrigability," as used in the prior proceedings and as reaffirmed in various particulars in the 1979 Supplemental Decree, should be retained. Other questions similarly should not be open for contest. For example, since equitable apportionment is not applicable to this case, evidence of changed circumstances, such as new technology regarding irrigability, should not ordinarily move the Court to alter its decree in a manner appropriate for a case involving such a doctrine. *See generally Nebraska v. Wyoming,* 325 U.S. 589, 616-20 (1945). To this extent, the State Parties' argument regarding the scope of Article IX has some merit. Matters once litigated and decided should not be reconsidered *absent some good reason.* Such concerns, however, are addressed to the exercise of the Court's sound judgment rather than its power.

The precise definition of the finality principle applicable to this case appears to be somewhat cloudy. No party has offered an explanation or authority that seems fully satisfactory. *Res judicata* for reasons explained above is not applicable. Yet the 1964 Decree would have no meaning if it is not accorded some degree of finality. Perhaps the most nearly applicable concept would be "law of the case" which is discussed

by some of the parties.[9] I believe that an analogy, useful in considering the present case, may be drawn from that doctrine as it operates in cases which are not within the original jurisdiction of the Supreme Court.

The doctrine of "law of the case" differs from *res judicata* because the latter compels adherence to a prior decision while the former merely directs the Court's discretion. It is a matter of good practice, not a limitation on the Court's power. *See Southern Ry. v. Clift*, 260 U.S. 316, 319 (1922); *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). Because such an inquiry involves the Court's sound judgment, any justifiable reliance interests ought to be weighed in the balance. *See* 1B *Moore's Federal Practice* ¶¶ 0.404[2], 0.404[3], at 431-35 (2d ed. 1980). On the other hand, a prior holding may be avoided if the Court is convinced that such a holding was clearly erroneous and would work a manifest injustice. *See White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967). In such cases, "[j]ustice is better than consistency." *Seagraves v. Wallace*, 69 F.2d 163, 165 (5th Cir.), *cert. denied*, 293 U.S. 569 (1934). My inquiry will be to determine, as best as possible, the manner in which the Supreme Court should exercise its sound discretion.

Every party has presented relevant arguments that touch upon this question. The United States and all the Tribes offer a number of reasons for opening the question of water rights for the omitted lands. The United States argues that the complexity of the prior litigation caused the mistake leading to the exclusion of the omitted lands from its prior claims.[10] The

9. *See* United States' Opening Post-Trial Brief 18a n.12 (May 1981); State Parties' Memorandum on Res Judicata 1 (Mar. 1981). *Cf.* Nevada Reply Brief 9 (June 1981).

10. United States' Pre-Trial Brief 16 n.21 (Aug. 1980).

United States also notes that even the State Parties admit that the vast majority of the omitted lands within the United States claims are practicably irrigable.[11] Some of the Tribes note that their absence as actual parties in the prior proceedings is a factor to be considered, because they did not have an opportunity to protect their interests.[12] In addition, all of the Tribes have, at different times and in varying degrees of vigor, argued that the United States' earlier representation of their interests was inadequate because of a conflict of interest and this circumstance alone vitiates the State Parties' defense of preclusion.[13] Other reasons of less persuasive force have also been offered.[14]

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11. *Id.* at 13 & nn. 15 & 16; United States' Opening Post-Trial Brief 23 (May 1981); United States' Closing Post-Trial Brief 12-13 (June 1981). *See* S. P. Exh. 110, at Table 1 (showing 17,314 gross irrigable acres of omitted lands compared to 24,415 of same represented as being claimed by United States). *See also* Four Tribes' Pre-Trial Brief 14-15 (Aug. 1980).

12. *See* Four Tribes' Pre-Trial Brief 15 (Aug. 1980).

13. Four Tribes' Pre-Trial Brief 16-20 (Aug. 1980); Trial Brief of Quechan Tribe 33-42 (Aug. 1980).

14. For example, the Four Tribes have claimed that the 1964 Decree should be reopened because the quantification standard for the Indians' water rights was adopted by the Court after the evidence in the case was developed. Four Tribes' Pre-Trial Brief 10-11 (Aug. 1980); Four Tribes' Opening Post-Trial Brief 109 (May 1981). Although the standard may not have been approved by the Court until after the evidence was prepared, the prior Master desired that the United States present evidence meeting that standard, and the United States on numerous occasions represented that it was presenting such evidence. *E.g.* Pr. Tr. 12461. Even if the law was unsettled at the time of trial, the standard, which was later adopted by the Master and the Court, was the same standard which the Master required the United States to use in its trial presentation. This fact thus adds little to the Tribes' case except insofar as the United States may have consciously departed from the standard while pressing its claims. That consideration would, however, bear more on the question of the adequacy of the United States' representation of the In-

The State Parties argue that any reopening of this once litigated issue would be unfair to them. Although the facts vary with the individual cases, most of the State Parties claim that they have relied upon the Court's prior determination of the Indians' water rights.[15] This reliance will have been undercut, these parties argue, if the quantity of Indian water rights is increased.

The detrimental impact on these parties by such an amendment cannot be seriously denied. What the Tribes gain someone else will lose, at least in the future.[16] But the present inquiry centers upon detrimental reliance rather than impact.

In some aspects, Arizona appears to present the most compelling case of detrimental reliance. That state initiated the present lawsuit to achieve certainty regarding its share of the Colorado River water. Fol-

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dians rather than the unfair surprise that may have resulted from the Court's adoption of a new legal standard for quantification of water rights.

15. Memorandum of Metropolitan Water District 27-34 (Jan. 1981); State Parties' Memorandum on Res Judicata 21-22 (Mar. 1981); Arizona Supplemental Res Judicata Brief (May 1981); Arizona Reply Brief 7-15 (June 1981); Nevada Trial Brief on Res Judicata 20-22 (May 1981); Nevada Reply Brief 10-12 (June 1981); State Parties' Post-Trial Opening Brief 233-34 (May 1981); State Parties' Post-Trial Closing Brief 55-70 (June 1981).

16. The Tribes argue that by removal of phreatophytes, vegetation along the river, the impact on the states will be lessened. *See* F.M. Exh. 17. The effect of this action does not seem so clear because no state is presently charged with such use of water by phreatophytes and if such water were available it would be part of the remaining water which could be used to satisfy the Mexican Treaty obligation. It is not clear whether under those circumstances the states would benefit in the amounts projected by the Tribes. This argument appears to be simply a claim to additional water rights through an alleged savings. As such it ignores that consumptive use is measured by diversions less return flows. 373 U.S. at 601.

lowing the 1964 Decree, Arizona successfully persuaded Congress to provide for the construction of the Central Arizona Project, a system for delivery of water to central Arizona.[17] In considering this legislation Congress examined the sufficiency of the water supply available to Arizona in light of the 1964 Decree.[18] The Senate concluded that even under the most conservative analysis the Project was feasible.[19] This calculation accounted for all water rights, including the Indians' prior decreed rights.[20] The Project was to receive the remainder of Arizona's share of the water.[21] Following the congressional approval of the Project, the Arizona legislature created a multi-county water conservation district to contract with the Secretary of the Interior for the Project's water and to collect taxes for repayment of the Project's costs.[22] By the time of the recent hearings, that entity had been collecting ad valorem taxes for approximately six years and was then holding in reserve approximately $9,500,000 to assist in the repayment of the Project's costs.[23] Any water rights given the Indians would reduce, by almost

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17. Colorado River Basin Project Act, Pub. L. No. 90-537, § 301, 82 Stat. 887 (1968) (codified at 43 U.S.C. § 1521 (1976)).

18. S. Rep. No. 408, 90th Cong., 1st Sess. 18-21 (1967), *presented in evidence as* U.S. Exh. 161.

19. *Id.* at 32. The Senate calculated that annual Project deliveries would equal:

Year	1975	1990	2000	2030
Thousands of acre-feet	1,809	1,281	1,061	723

Firm supply in the year 2030 was estimated to be less than 361,500 acre-feet of water. *Id.* at 35 & n.3.

20. Tr. 2692-93.

21. *Id.*; S. Rep. No. 408, *supra* note 19, at 32-35.

22. Tr. 2694.

23. Tr. 2695.

identical amount, the water to be used by Arizona for the Project.[24] If all of the present Indian claims are upheld, the possible loss to the diversions for the Central Arizona Project would be 128,000 acre-feet per year resulting in a loss of delivery of 115,000 acre-feet per year to central Arizona.[25]

This reliance analysis might be questioned because of some additional facts. Arizona presently expects that its firm supply of Colorado River water for the Central Arizona Project will be 550,000 acre-feet in the year 2035.[26] When Congress considered the feasibility of the Project, it based its analysis on a firm supply of less than 316,500 acre-feet by the year 2030.[27] Thus, Arizona might have more water available for use in the Project than was anticipated when Arizona and Congress relied upon the 1964 Decree.[28] From this information, it would appear that the Project would still have been built if the new firm supply had then been known even if it were reduced by the additional claims for the Reservations. But there is still great uncer-

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24. Tr. 2723.

25. Tr. 2752. These figures offered by the Director of the Arizona Department of Water Resources apparently accounted for losses to Arizona from the claims of the Tribes as well as the claims of the United States. *See* Tr. 2723 (claims of government and Tribes would deplete the diversions to Central Arizona by 128,000 acre-feet per year). Apparently this figure represents an estimate of the amount of water claimed for both omitted lands and boundary lands because Arizona contends that the omitted lands claim will "directly" affect the amount of water for the Project, and that the Tribes, as of September, 1980, claimed 114,788 acre-feet of water for omitted lands and 15,824 acre-feet of water for boundary lands. Arizona Supplemental Res Judicata Brief 6 (May 1981). These latter figures assume a consumptive use rate of 4.0 acre-feet per net acre.

26. Tr. 2707.

27. *See* note 19 *supra*.

28. The average figures for available water are similarly greater than expected. The current estimates as offered by Arizona are:

tainty regarding the future supply of water available to Arizona. The United States Water and Power Resources estimates Arizona's firm supply for the Central Arizona Project at 400,000 acre-feet.[29] At the time of trial even allocations within the State were uncertain.[30] The real impact of additional Indian water rights is in the future. Whether Arizona relied to its detriment in these respects is not yet determinable.

Arizona's reliance can, however, also be seen from a different perspective. Arizona has consistently argued simply that it relied upon all Indian water rights as fixed by the 1964 Decree.[31] Arizona's position might be supported by the view that in making its plans Arizona accepted all gains or losses arising from predictive error. If the prediction was high and there was a shortfall, Arizona could accept that because it also knew that if the prediction was low it would have the benefit of the excess water in the otherwise leaner years when the Upper Basin was developed. In this manner also, Arizona might have detrimentally relied upon the 1964 Decree.

Two other State Parties have presented similar, yet less convincing, evidence of reliance. The Metropolitan Water District, after losing certain water rights under the 1964 Decree, contracted with the California State Water Project for an additional annual entitlement of

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Year	Avg.*	Firm*
1985	1,600	1,600
2005	N/A	700
2035	1,000	550

*These figures are indicated in thousands of acre-feet per year.
Tr. 2703, 2706-07. *Compare* note 19 *supra.*

29. Tr. 2767.

30. Tr. 2693-94, 2761, 2708-18.

31. Arizona Reply Brief (June 1981).

500,000 acre-feet of water.[32] The Project could feasibly be expanded at that time and was enlarged to accommodate the District's increased need.[33] Further enlargement would not be presently feasible,[34] and a second aqueduct for delivery of additional water would be a more costly alternative.[35] Following the 1964 Decree the District annexed new areas and, thus, obligated itself to larger commitments for the delivery of water.[36] When the District is ready to use its full entitlement of State Project water, unless an alternative source is secured, there will be a shortfall by any new losses the District suffers, whether the District's call on the State Project reaches its maximum in 1990 as originally expected or 20 to 30 years later as now expected.[37]

This showing of the District's reliance is clouded by an additional consideration. As the United States notes "the record does not indicate the decrease in [the District's] supply if the additional claims" are upheld.[38] The District's reply to this challenge does not fully explain why the District will receive less water if the Tribes receive additional water rights.[39] Neverthe-

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32. Tr. 2925-26. In addition the District knew that Los Angeles was also increasing its water supply by 150,000 acre-feet from the Owens Valley and that increase would also help offset the loss which totalled 662,000 acre-feet. Tr. 2928-29.

33. Tr. 2926-31.

34. *Id.*

35. Tr. 2932.

36. Tr. 2929.

37. Tr. 2923-24.

38. United States' Opening Post-Trial Brief 31 (May 1981).

39. State Parties' Post-Trial Closing Brief 67-68 (June 1981).

The District's literature indicates that its 550,000 acre-feet firm share will yield only 450,000 acre-feet after allowing for higher priority uses and system losses. U.S. Exh. 94, at 3. This estimate is qualified by the cautionary statement that possibly only 400,000 acre-feet will be available. Although the Tribe's decreed rights and petition for additional rights

less some measure of impact can be expected because of the nature of the District's entitlement to the water. Under the Seven Party Agreement,[40] the District has the fourth and fifth priorities for over 1,000,000 acre-feet of water per year from California's share of water in the river. In years of normal water supply, the District would not receive the entire contractual amount when Arizona uses its entitlement. The District's entitlement would be further ousted to some extent by additional senior water rights because its water rights are currently the most junior in a normal year.

Some additional loose ends are more troubling and leave serious questions regarding whether the District would have taken different action if the present Indian claims had been successfully presented in the earlier proceedings. The District apparently sought only to replace losses in 1964 that went to Arizona.[41] The losses that went to the Tribes apparently were not considered as losses that required replacement. This attitude toward the Indian rights has continued, because no plans have apparently been made regarding the possibility of increased awards in the event the Reservation boundary questions are resolved against the State Parties.[42] From this evidence one could find that the District simply ignores the Indian water rights in its planning process and thus does not rely on an award at a specific level. Nevertheless, I believe that the District

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were both mentioned the literature did not specifically state the impact of either. The District's witness at one point seemed to indicate that the decrease to 400,000 acre-feet would include additional losses to the District resulting from additional gains by the Tribes, but the specific magnitude of such losses was not indicated. Tr. at 2955.

40. Pr. Ariz. Exh. 27.

41. Tr. 2925-26.

42. Tr. 2943-44.

in taking such actions as annexing new areas may have relied upon the terms of the 1964 Decree.

Nevada's claim of reliance presents an entirely different situation. Nevada's presentation was unpersuasive. Nevada undoubtedly relied upon the decree.[43] But the reliance according to Nevada's presentation does not appear to have been to Nevada's detriment even if the present claims are granted. Under the 1964 Decree, that state was allocated, for its annual consumptive use, 300,000 acre-feet of water.[44] Following the 1964 Decree, Nevada began construction of the Southern Nevada Project which will have a "total diversion capability" of 299,000 acre-feet of water.[45] Nevada's expert witness stated that these diversions would result in a net return flow of approximately 35%, which could be credited to lessen Nevada's consumptive use of water through the Project.[46] The consumptive use of the Project thus approaches only 194,350 acre-feet per year. Despite the representations of Nevada's counsel and witness, this figure is not "practically the entire state's allocation."[47] Nevada did not show that granting the present claims would impair the ability of the state to divert 299,000 acre-feet of water per year through this Project in a normal year. The Nevada witness did state that any additional Indian water rights would be deducted from the Project's diversion rights,[48] but in light of Nevada's confu-

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43. Tr. 2988, 2992-93, 3040-41.

44. 376 U.S. at 342.

45. Tr. 3013.

46. Tr. 3050-51. That witness later indicated that 35% for return flows would not apply to all diversions in the state and that, according to its contracts, Nevada could divert a total of approximately 400,000 acre-feet of water. Tr. 3059-60.

47. Tr. 2989.

48. Tr. 3031.

sion over the distinction between diversion and consumptive use this conclusional statement is unimpressive as a general proposition. This same witness indicated that Nevada's water allocation contained 10,000 acre-feet of water for which there was no contract as yet.[49] The real concern must lie in years of shortage.[50] But even then Nevada's claim of detrimental impact seems flawed. Nevada has presently set aside for the Indians a total *consumptive use* figure of 12,500 acre-feet of water per year.[51] Under the 1964 Decree the one Tribe in Nevada acquired the right to *divert* approximately 12,500 acre-feet per year to irrigate its land.[52] Obviously, if any water returns to the river, Nevada's total consumptive use will be decreased by that amount. Yet Nevada made no allowance for such return flows. This decision was made either because, according to its experts' first explanation, Nevada mistakenly understood the 12,500 acre-feet figure to be a consumptive use figure rather than a diversion figure[53] or because, according to his second explanation, she was uncertain whether there would be any return flows.[54] Some return flows should logically be credited and by any formula used in this case the consumptive use of the present claims together with the decreed rights would not exceed the amount Nevada has already set aside for the Indians.[55]

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49. Tr. 3022-23.

50. Tr. 3008, 3024-25.

51. Tr. 3019.

52. *See* Tr. 3019-20; Pr. Calif. Exh. 3517; U.S. Exh. 1322; SPECIAL MASTER'S REPORT at 282.

53. Tr. 3019.

54. Tr. 3049.

55. Nevada for its own Project assumes return flows of approximately 35%. Tr. 3051. This figure indicates that when the Tribe diverts 6.46 acre-feet per acre that consumptive use would be approximately 4.2 acre-

Absent additional facts or a more coherent explanation of the present evidence, I cannot find that Nevada has demonstrated that her reliance on the 1964 Decree would be undercut by the granting of the present claims.

Much of the discussion regarding reliance is superfluous. Not a great deal of evidence is really needed to convince anyone that western states would rely upon water adjudications. Some parties have presented in this case more specific and convincing proof of detrimental reliance than have others. Nevertheless, it would be unrealistic to conclude that those parties would not have used the 1964 Decree as a basis of future plans. Under some circumstances every party might suffer a detriment because of reliance on that Decree even though I find it difficult to determine from the testimony exactly what significant, different action the State Parties would actually have taken if the Indian Reservations had received in 1964 the water rights now requested. This litigation is, thus, important to all such parties, aside from the simple possibility that they might lose an expectancy from the 1964 Decree. This reliance, however, might not be sufficient to foreclose the present claims.

With a full sense of the seriousness of the matter I conclude that the omitted land question should be de-

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feet per acre. Other experts in this case have used return flows of a similar magnitude in arriving at a consumptive use figure of 4.0 acre-feet per acre. Tr. 1084; F.M. Exh. 1. The past decreed rights cover approximately 1939 net acres. *See* note 52 *supra*. The present claims would add approximately 749 gross acres to that total. *See* F.M. Exh. 2, Table 8; U. S. Exh. 42, Table 7. Even if the current claims are not reduced to a net amount and 2688 acres receive a diversion of 6.46 acre-feet of water per acre, the consumptive use of approximately 11,290 acre-feet is still less than the 12,500 acre-feet Nevada has set aside in its planning process for the Tribe's consumptive use.

termined on the merits rather than held foreclosed by the State Parties' plea of preclusion. A number of considerations guide my decision.

As the United States notes, this case has from the beginning involved a number of complex issues and difficult matters of proof. No one should be surprised that some mistakes occurred earlier. In fact, an absence of mistake would have been reason for surprise. For just such a reason water rights decrees often include a retention of jurisdiction which may be used to adjust the water rights decreed in the event an error is discovered. 6 *Waters and Water Rights* § 531.7, at 522 (R. Clark ed. 1972). *See City of Los Angeles v. City of Glendale,* 23 Cal.2d 68, 142 P.2d 289, 297 (1943). *See also Taylor v. Tempe Irrigating Canal Co.,* 21 Ariz. 574, 193 P. 12, 14-15 (1920); *Benson v. Burgess,* 192 Colo. 556, 561 P.2d 11, 13-14 (1977). Article IX, consistent with similar provisions in other cases of this nature, reserved jurisdiction in the Supreme Court in order to consider any mistakes which the Court might wish to correct. Certainly the parties seemed to perceive it as such a provision.[56] Although the 1964 Decree may have given a relatively stable allocation of water rights, unyielding reliance upon it was inappropriate, because it was modifiable for good reason.

The omitted lands claim presents just such a matter. *One of the few aspects of this case that has drawn agreement among the parties is the existence of irrigable lands which were "omitted" from the claim for water rights in the earlier proceedings.* The State Parties admit that the large majority of omitted lands for which water rights are claimed by the United States are practicably irrigable. The policies underlying pre-

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56. *See* note 5 *supra.*

clusion, however salutary generally, begin to offend the appearance of justice when a party admits that his opponent received less than a full measure of justice before the Court and cannot now remedy the situation by modifying the original decree.

This aspect of fairness holds particular importance in the present case. I would be more reluctant to allow the United States to relitigate a matter that concerned only its own interests. In this case, however, the Tribes would bear the burden of this injustice. During the earlier proceedings they were not parties. The United States as trustee or guardian represented them. *See* 25 U.S.C. § 175 (1976). They had no opportunity to present their case. This fact represents a compelling reason for the Court to exercise its power to correct what otherwise would be a serious error in defining their rights. In my view Article IX should be used in this case as an instrument of justice to give the Tribes what rightly belongs to them. That provision clearly reserves such power for the Court and this matter constitutes sufficient good reason to risk upsetting whatever reliance may have been based upon the Court's prior conclusions.

My recommendation draws additional support from my reading of the record of the prior hearings in this case. I believe that the "omission" of a significant amount of factually supportable claims clearly occurred in the earlier proceedings. Although the United States lawyers at the earlier trial presented substantial claims for the Tribes, these claims fell short of the maximum possible claims under the standards required by the prior Master. In a paternalistic sense the result obtained by the United States might seem fair because the Tribes received much-needed water rights. But the trustee's duty is not to decide what is *fair*, his

duty is to present the *best* case for his Indian wards. An objective view of the facts reveals that actual fairness was not achieved in the sense that under the legal standards applied in this case the Tribes would have received more if the United States as trustee had dedicated its efforts to maximizing the Tribes' welfare.[57]

The indications of this occurrence can readily be located in the transcript of the prior proceedings.[58] Using a few examples, an expert engineering witness for the United States during the earlier proceeding revealed during cross-examination that the United States had mistakenly failed to include all irrigable land in its claims.[59] This witness also offered various

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57. United States counsel represented that he was presenting claims that were "fair" to the Indians and "fair" to everyone else. Pr. Tr. 12471. As trustee the United States was obligated to assert maximum claims, not merely claims that it believed were "fair." This duty was recognized by counsel later. Pr. Tr. 12564. But the inference remains that the United States was too concerned about fairness to the other parties.

58. *See, e.g.*, Pr. Tr. 14113-19, 14150-57.

59. Pr. Tr. 14151-53. One might argue that irrigable is not necessarily the same as practicably irrigable. The initial line of questioning began with the suggestion that irrigable meant arable on the basis of soil classification. Pr. Tr. 14150. But the context of the testimony forecloses such an argument. The witness would never have described his failure to include those lands as a factual mistake if he was not using the word irrigable to mean lands that were practicably irrigable, in the sense that the then-claimed lands were practicably irrigable. *Id.* Moreover, both the examiner and witness stated later that they used the word irrigable to mean feasible to irrigate. *See* Pr. Tr. 14152-53, 14214. This discussion was premised upon the extent that the United States accounted for economic feasibility in its claims, *see* Pr. Tr. 14119-25. Thus it would have been nonsensical for the witness to have used the word irrigable without regard to practicability. The witness, thus, must have meant "practicably irrigable" when he used the word "irrigable."

In order to present all the facts, I must state that this witness later testified that he did not make a "mistake." This retraction occurred only after the Master and the United States counsel redefined "practicably irrigable" to mean land served by existing or then-proposed irrigation

unpersuasive reasons for limiting the claims.[60] In addition, the basic methodology of those experts seems flawed. The United States engineers mapped certain tracts of land for irrigation projects which they generally considered to be clearly economically feasible and then the soils expert classified such land within the mapped boundaries.[61] This order of inquiry and loose analysis of general economic feasibility was obviously not designed to discover the maximum extent of the practicably irrigable acreage on the Reservations.[62] Some of these same lands, I believe, are lands for which the United States now claims water rights.[63]

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systems. This second definition constituted more of a legal limitation of claims rather than a factual test. In this light, the witness might consistently state that in that sense he did not make a mistake and still claim that irrigable land was excluded from the claims. Pr. Tr. 14152-54.

60. Pr. Tr. 14113-19, 14150-51.

61. *See* Pr. Tr. 14119-57, 14264-66A.

62. For example, when pressed about the economic feasibility of his project design, the United States witness replied that he only considered such things as "appear[ed] reasonable" and that most of the designs he presented were "entirely feasible at very rigid economic feasibility." Pr. Tr. 14122. This investigation was not designed to produce the maximum claims because the experts were not attempting to determine whether the marginal returns equalled the marginal costs. Rather they designed irrigation systems that they felt were clearly economically feasible. "[I]t was not limited. We did not have occasion to investigate the limits of it because they are all entirely within practices of economics." *Id.* Obviously, unless such an inquiry is pressed to a close marginal analysis, the maximum feasible claim has not been determined.

63. The mesa lands on Fort Mojave which the witness said he mistakenly omitted most probably lie in the present Calada Unit. *See id.* at 14151-52. A large amount of land along the Arizona side of the River on the Colorado River Indian Reservation was also noted to be susceptible to farming but was omitted primarily because of the "recreational possibilities of the area." The witness also mentioned that he thought the area would serve as a buffer zone for the irrigation unit to the east of the levee in case of flood. He concluded by stating that it is "possible that some of that should be irrigated too." Pr. Tr. 14113-14. These reasons appear rather weak in light of the purposes of this inquiry. This area

The State Parties initially characterized the United States' failure to claim water rights for the omitted lands as a "reasoned tactical decision."[64] They did not reveal what legitimate tactical basis would have supported a decision by the United States as trustee to fail to press water rights claims for the omitted lands. The United States replies that it finds it impossible to determine the reason for the limitation of its claims in the prior proceeding.[65] The precise reason for this failure may be unknown but the failure to claim such lands is clear.

The State Parties later offered the explanation that these claims were not pressed because the United States believed the land was not practicably irrigable.[66] This theory is belied by several factors. First, the United States' own witnesses indicated at the hearings that irrigable land was mistakenly excluded from the claim. Second, the method utilized by the engineers and soils experts was not designed to discover a maximum claim. Most important, the State Parties' concession that the majority of the omitted lands claimed now by the United States is practicably irrigable tends to show that water rights for the land were omitted for some reason other than a belief that the land did not meet the standards used in the case. If such amount of those lands is so clearly practicably irrigable as to provoke such a concession from an adversary, a trustee such as the United States would certainly reach the

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consists of several thousand acres for which the United States presented a claim in the present proceedings. *See* U.S. Exh. 42, map of Colorado River Indian Reservation. *See also* Pr. U.S. Exhs. 560, 562.

64. Memorandum of Metropolitan Water District 20 (Jan. 1981).

65. United States' Closing Post-Trial Brief 11-13 (June 1981).

66. State Parties' Post-Trial Closing Brief 64 (June 1981), Arizona Supplemental Res Judicata Brief 9 (May 1981).

same conclusion if the proposition were fairly studied. The record does not support the State Parties' assertion that the United States originally found the lands to be non-irrigable.

I cannot imagine any legitimate reason, from the perspective of the Tribes, that would cause the United States to present less than the maximum claims which may be made in good faith on behalf of the Tribes. The State Parties' statement regarding tactical decisions approaches an admission on their part that the United States openly failed to carry out its trust responsibility. For some reason, the United States openly failed to present evidence of the maximum claims for the Tribes as measured by the standard called for by the prior Master.[67]

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67. The reason for the inadequacy of representation seems unimportant and perhaps unknowable. Everyone recognizes that in this case as in many others the United States represents interests which conflict with its Indian wards. There was, however, no direct evidence that such a conflict influenced the litigation strategy of the United States, largely because the United States successfully invoked claims of privilege at the relevant points during the hearings. Perhaps the closest explanation lies in the United States' support, in the earlier proceedings, for an open-ended decree which allowed for relitigation of additional Indian water rights. *See, e.g.*, Pr. Tr. 12451-69-A. *See also* United States v. Ahtanum Irrig. Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957); Conrad Investment Co. v. United States, 161 F. 829 (9th Cir. 1908); Motion of the United States for Modification of Decree and Supporting Memorandum 28-29 (Dec. 1978). The United States recognized the conflict between a final adjudication and complete protection of the Tribes' rights. Pr. Tr. 12466-67, 12469. Perhaps the claims were for some reason prepared with the view that the Court would expressly leave its decree open-ended with respect to the Indians' water rights. Such an assumption, of course, would have been unwarranted and at odds with the representations of United States counsel to the prior Master. But such an explanation has the merit of explaining former counsel's suggestion that if some irrigable lands were omitted the United States would later file leave to amend. Pr. Tr. 14156.

Such a modification may have been within the expectation of the prior Master. The State Parties have placed special emphasis on his inclination to fix finally the Indians' water rights and his statements that he considered the United States bound on its claims brought for the Indians. But the inescapable fact is that he wrote a broadly-phrased Article IX which was adopted by the Court. The context in which he wrote it is important. In any interstate water case there will be strong need for the retention of this sort of power for many reasons. The Master was specially put on notice that the United States might have been understating the Indians' rights.[68] Of course, the Master pressed the United States counsel, because it was in all parties' interest to get the Indians' rights fixed as near the permanent level as possible. But in view of the likelihood of an error or omission by the United States, the former Master might have viewed a modification of the Indians' rights as one of the amendments which might be necessary in the future. For this reason among others, he may have desired that Article IX be included in the decree to protect the Indians' rights if an error was made in those proceedings.

The present request for modification does not, in my view, come too late. Obviously the decree must be considered closed on these matters at some time. But in the context of this case the present motions occurred at a reasonable time. Only recently did the Court upon joint motion of the State Parties and United States enter its decree listing the present perfected rights in the lower Colorado River Basin. According to the 1964 Decree this process was to have been finished by 1966. Yet this important step, with-

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68. Pr. Tr. 12469, 12559-60, 14119-57.

out which there doubtless was great uncertainty, did not occur until 1979, almost fifteen years after the entry of the initial decree. The present motions for modification antedate the 1979 Decree because in 1977 three Tribes raised this "omitted lands" issue in their motion to intervene.[69] Shortly thereafter in 1978 the two other Tribes filed a similar motion as did the United States.[70] Even though these motions occurred years after the initial decree they were not tardy when viewed in the context of a case that has progressed slowly since the filing of the complaint nearly thirty years ago. Although the case had reached a point where the allocation of water rights was relatively stable they were not irrevocably fixed when the present motions occurred, and thus those motions were not tardy.

I recommend that the Court exercise its power under Article IX and reach the merits of the "omitted lands" claim.[71] The importance of this litigation to the State Parties, although impressive, does not outweigh the sense that the Court should correct an unjust result. The State Parties' reliance does not alter my conclusion. All parties knew that Article IX might be uti-

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69. Motion for Leave to Intervene as Indispensable Parties by the Fort Mojave Tribe, the Chemehuevi Tribe and the Quechan Tribe. (Dec. 1977).

70. Motion of Colorado River Indian Tribes and the Cocopah Indian Tribe for Leave to Intervene (Apr. 1978); Motion of the United States for Modification of Decree (Dec. 1978).

71. This conclusion makes unnecessary any consideration of the arguments raised by the Tribes that due process prevents preclusion of them because they were represented in the prior proceedings by a party not in privity with their interests. *See* Hansberry v. Lee, 311 U.S. 32, 41 (1940); United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286 (9th Cir. 1981). Undoubtedly some of the same considerations as discussed in text would apply to such an inquiry, but I believe my recommendation should presently rest on the narrower ground of Article IX of the 1964 Decree.

lized to modify the prior decree. Although the present claims are not so "insignificant" as the United States contends,[72] they do appear to be relatively minor adjustments of the kind which might legitimately be expected in the aftermath of a much larger original case. Similarly the timing of the claims can best be understood in view of the long history of this mammoth case. In my view, fairness to the Tribes prevents the State Parties' absolute reliance upon a modifiable decree from foreclosing the omitted lands claims.

B. *Final Determination of Reservation Boundaries*

The 1964 Decree in paragraph II(D)(4) provided for the allocation of water for the benefit of the Colorado River Indian Reservation. Similarly, paragraph (5) provided for the allocation for the Fort Mojave Indian Reservation. The last clause of paragraph (5) contained the following language:

> provided that the quantities fixed in this paragraph and paragraph (4) shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

376 U.S. at 345. The 1979 Decree specified that the latter provision is unaffected by the Court's determination of present perfected rights. 439 U.S. at 421. In addition, the 1979 Decree contained the following language similar to paragraph II(D)(5):

> the quantities fixed in paragraphs (1) through (5) of Art. II(D) of [the 1964] Decree shall con-

72. *See, e.g.*, United States' Opening Post-Trial Brief 23 (May 1981).

> tinue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

Id. Now, not only the Fort Mojave and Colorado River, but the other three Tribes as well, and the United States on behalf of all of them, seek an adjustment providing additional present perfected rights. They contend that boundary line changes since 1964 have increased the practicably irrigable acreage of the Reservations. The Tribes and the United States rely on the present boundaries as fixed by orders of the Secretary of the Interior, certain court decisions and an act of Congress as satisfying the condition that the water rights may be adjusted "in the event that the boundaries of the respective reservations are finally determined."

All the parties agree that the Court should now determine any additional present perfected rights. Although the 1964 Decree acknowledged and expressly provided for boundary disputes only with respect to the Fort Mojave and Colorado River Indian Reservations, the additional proviso of the 1979 Decree, issued after the Court was apprised of boundary disputes concerning the other Reservations, indicates that the amounts determined for all five Reservations "shall continue" to be subject to adjustment. Thus, adjustments for boundary determinations affecting any of the Reservations were explicitly provided for in the 1979 Decree and impliedly contemplated in the 1964 Decree "in the event that the boundaries of the respective reservations are finally determined."[73]

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73. In any event, Article IX, even most narrowly construed, would recognize the propriety of entertaining claims as to the Chemehuevi, Fort

The State Parties concede that when the boundary lines have been finally determined, the Court should allot the water rights in proportion to the practicably irrigable acreage of additional boundary lands, and urge that the Court should now consider such an allotment.[74] They contend, however, that the boundaries have not been finally determined and that I should make a de novo determination of the boundaries for recommendation to the Court. The issue, then, is whether the Secretarial orders, court judgments, and Act of Congress relied on by the Tribes and the United States are the sort of final determinations contemplated by the Court's Decrees.

The parties are not in disagreement over the land areas involved in the boundary determinations at issue. They are here outlined as presented by the motion of the United States,[75] and not disputed by the State Parties or by the Indian Tribes.

1. *Fort Mojave Indian Reservation*

Two boundary adjustments affect this Reservation: (1) the restoration of that portion of the so-called Hay and Wood Reserve west of the Blout survey of 1928; and (2) the adjudication of a tract, formerly claimed

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Yuma, and Cocopah Reservations paralleling those that can be raised as to the Fort Mojave and Colorado River Reservations under Article II(D)(5). *See* Wisconsin v. Illinois, 388 U.S. 426 (1967), *modifying* 281 U.S. 696 (1930); New Jersey v. New York, 347 U.S. 995 (1954), *modifying* 283 U.S. 805 (1931). *Cf.* Winters v. United States, 207 U.S. 564 (1908).

74. Response of the States of Arizona, California, and Nevada, and Other California Defendants to the Motion of the United States for Modification of Decree 20-25 (Feb. 1979).

75. Motion of the United States for Modification of Decree and Supporting Memorandum 17-23 (Dec. 1978).

by the LaFollettes, as properly part of the Reservation.

(a) *The Hay and Wood Reserve*

The Hay and Wood Reserve — once attached to the Camp Mojave Military Reservation for supplies of hay and wood and transferred by Executive Order with the camp in 1890 to the Department of the Interior for the benefit of the Tribe — constitutes approximately 9114.81 acres of a central portion of the Fort Mojave Indian Reservation. The Executive Order described by courses and distances such an area that straddled the Colorado River. Contrary to the description by courses and distances, a surveyor, Sidney Blout, determined under the direction of the General Land Office that the western boundary of this parcel lay further to the east than the description would allow. The correctness of that survey which eliminated several thousand acres from the Reservation was long disputed within the Interior Department. The United States in the original proceedings in this case claimed that the description by courses and distances in the Executive Order determined the Reservation boundary. The Master made findings and conclusions of law accepting the Blout survey as determinative but the Court disapproved the Master's effort to determine disputed Reservation boundaries, 373 U.S. at 601, and the question remained open. As a result the Court decreed water rights only for the portion of this parcel that was undisputedly within the Reservation as surveyed by Blout. On June 3, 1974, the Secretary of the Interior, acting on the advice of the Solicitor of Interior, resolved the internal dispute within the Interior Department by declaring null and void the 1928 Gen-

eral Land Office survey by Blout and restoring the former boundary for the Hay and Wood Reserve a little more than a mile westward. A new plat was prepared reflecting the order; it was protested by alleged patentees of land in the disputed area; these objections were overruled and the final plat was approved and filed on November 6, 1978. This plat added to the Reservation some 3,500 acres not treated as part of the Fort Mojave Reservation when the water allocations were decreed in 1964. The United States alleges that this tract contains approximately 2,000 practicably irrigable acres.[76]

(b) *The LaFollette Tract*

This tract is on the west side of the Fort Mojave Reservation, south of the Hay and Wood Reserve and east of the River. Here the Tribe obtained a stipulated judgment in is favor against the assignees of a railroad patent grant, which had the effect of adding most of a section to the Reservation.[77] The United States alleges that this judgment placed approximately 500 additional irrigable acres within the adjusted Reservation boundary.[78] The Fort Mojave Tribe also claims water rights for some additional boundary lands in this area.[79]

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76. U.S. Exh. 42, Table 7.

77. Fort Mojave Tribe v. LaFollette, Civ. No. 69-324MR (D. Ariz. Feb. 7, 1977).

78. U.S. Exh. 42, Table 7.

79. F.M. Exh. 2, plate no. 1; F.M. Supp. Exh. (Sept. 1981), record item no. 192; Letter from Thomas W. Fredericks (Nov. 10, 1981), record item no. 202.

2. *Chemehuevi Indian Reservation*

The boundary change at this Reservation adds some 2,430 acres along Lake Havasu. These lands were restored to the Chemehuevi Indian Reservation by Secretarial Order of August 15, 1974, the result of a determination that part of the land taken from the Reservation for the construction of Parker Dam was not needed. Although the United States once alleged that the restored land contained 150 practicably irrigable acres, neither the United States nor the Tribe presently makes a claim of irrigability for any boundary lands.[80] Thus, I will consider their claims as dealing with only omitted lands.[81]

3. *Colorado River Indian Reservation*

There are two boundary adjustments affecting this Reservation. The first is the so-called "Benson Line" area; the other lies along the northwest boundary.

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80. U.S. Exh. 42 at Table 9; CH. Supp. Exh. (Sept. 1981), record item no. 184.

81. The exhibits tendered in the proceedings before the prior Master show some of the acreage presently claimed as omitted land to be labelled "Reclamation Withdrawn Area to be Restored." Pr. U.S. Exh. 1207. I have received no information indicating that the area so described to any extent coincides with the area restored by the 1974 Secretarial Order.

The State Parties once claimed that the restored acres, having been transferred from the trust for the Indians, retained no reserved water rights upon the reconveyance to the trust. Memorandum of the Urban Agencies re the Indian Reservation Boundary Question 10 (Apr. 1979). In light of Pr. U.S. Exh. 1207, this argument, to the extent it has any bearing on the present case, appears equally applicable to the omitted lands claim made presently as well as to any other restored lands denoted as boundary lands. The State Parties, however, have not pursued this argument and, in any event, it seems foreclosed by the Court's award of water rights to a large amount of such restored land in the 1964 Decree. *See id.*

(a) *The Benson Line*

At the time of the original hearings before the prior Master, doubt existed whether the central western boundary was the mobile west bank of the Colorado River or a line meandered by W.F. Benson in 1879, now well into the California side of the river. The Master undertook to resolve the question also, but the Court disapproved his attempt to fix the the boundary, and the matter was left open. Subsequently, on January 17, 1969, the Secretary of the Interior formally adopted the Benson Line as the western boundary of the Reservation along the entire segment covered by the Benson survey. The United States subsequently obtained final judgments in title disputes with private parties in the United States District Court for the Central District of California,[82] partially stipulated, quieting its title as trustee for the Tribes to separate parcels within this additional area. This Secretarial Order added some 4,400 acres to the Reservation.

(b) *The Northwest Boundary*

During the investigation of the Benson Line problem, the Secretary discovered what he considered to be another surveying error. As a result of this discovery, the Secretary directed that the old survey be suspended, and he approved a corrected plat on December 18, 1978. This new plat moved one end of the northwest boundary to a point westward and added approximately 450 acres to the Reservation from public lands of the United States.

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82. The opinions are unpublished.

The United States claims that approximately 3,500 acres of boundary land on this Reservation are practicably irrigable.[83]

4. *Fort Yuma Indian Reservation*

By order of December 20, 1978, the Secretary of the Interior upheld a long-standing claim by the Quechan Tribe of Fort Yuma which had previously lost the same dispute before the Solicitor of the Interior Department. This order resulted from a subsequent argument to the Solicitor who then (1978) issued an opinion in favor of the Tribe. The order determined that the original boundaries of this Reservation as established in 1884 are the true boundaries.[84] At the time of the original proceedings in this case, the boundaries were considered to contain only the area allotted by trust patents to members of the Tribe. The Solicitor's Opinion notes that some 25,000 acres are affected by his ruling. The opinion and order are, however, subject to a number of third party interests acquired prior to the recent rulings. The United States claims approximately 5,800 acres of irrigable boundary lands within this Reservation.[85] The Quechan Tribe claims that several thousand additional acres of boundary land are irrigable.[86]

5. *Cocopah Indian Reservation*

The boundary of the West Cocopah Reservation has been adjusted by two occurrences since the 1964

83. U.S. Exh. 42, Table 8.

84. Quechan Indian Reservation Boundaries, Secretarial Determination and Directives, 46 Fed. Reg. 11372.

85. U.S. Exh. 42, Table 10.

86. F.Y. Supp. Exh. (Nov. 1981), record item no. 199.

Decree which have affected separate portions of the Reservation: (1) an area of accretion to the west of the old boundary; and (2) a tract added by an act of Congress to the south of the accreted lands.

(a) Substantial lands accreted to the western side of the Reservation because of the gradual western movement of the Colorado River. The government relies on a final judgment entered May 12, 1975, for its claim that 883.53 acres have thus been recognized to be a part of the Reservation.[87]

(b) By Act of June 24, 1974, 88 Stat. 266, Congress extended the boundaries of the West Cocopah Reservation.

The United States contends that there is a total of 1,161 acres of practicably irrigable boundary lands in the Cocopah Reservation.[88]

There is no dispute as to the total number of acres of land that would be added to the several Reservations if the boundaries, outlined above, are accepted as finally determined for the purposes of the motion to adjust the Court's Decree.

I conclude that the determinations that have been made with respect to the stated boundary changes may be accepted as final for the purpose of considering additional allocations of water rights to the Reservations. This conclusion is limited to that specific purpose. I make no findings with respect to titles to the land involved, either as to private claimants or as to any other contestant over the correctness of the boundary lines. Nor do I consider that the acts of the Secretary or of the courts in private litigation are *res judicata* of

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87. Cocopah Tribe of Indians v. Morton, No. Civ-70-573-PHX-WEC (D. Ariz. May 12, 1975).

88. U.S. Exh. 42, Table 9.

the boundaries as to litigants who were not parties to such proceedings. I consider only whether the acts of the Secretary and the acts of the courts in private litigation accepted by the Secretary fall within the sphere of finality to permit the parties to act on them until some interested party succeeds by a plenary action in vacating or setting aside such determinations. For present purposes, I believe that these acts provide the sort of finality contemplated by the Court when it left the boundary disputes concerning the Reservations for later determination.

At the outset, it is important to bear in mind the role which the boundary determinations play in this case. This is a water rights case, not a land case. The acreage of the Reservations is an issue because practicably irrigable acreage is made the measure of the Reservations' water rights. In *Winters v. United States*, 207 U.S. 564 (1908), the Court established that the United States, when it creates an Indian reservation, impliedly reserves water for needs of the reservation, and that water rights established subsequent to those of the reservation give way to those of the reservation as its needs expand. The Court applied the *Winters* doctrine in its original opinion in this case, holding that at the time it created the five Reservations at issue here, the United States reserved enough water "to satisfy the future as well as the present needs of the Indian Reservations." 373 U.S. at 600. The Court concluded, agreeing with the Master, "that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." *Id.* at 601. The Master's choice of irrigable acreage as a measure was based on the conclusion that it provided an estimate of the amount eventually needed to make the otherwise arid lands productive. The Indians' actual

use of the water remains unrestricted. Practicably irrigable acreage, then, is a rough measuring stick, a tool toward an informed equitable estimate of the Indians' needs, both present and future. To use this measuring device, in turn, it is necessary to know the extent of the Reservations, and to measure the latter, the boundaries. The boundaries are a reference point for an issue itself secondary to the central concern of this case, water rights.

The model of the previous treatment of the boundary determinations by the Court itself much weakens the contention of the State Parties. They say that I should now receive de novo evidence of the correct boundary lines and the claims of private individuals for a recommendation to the Court so that it would make a determination of the correct boundaries in this litigation. In the original litigation of this case, the Master received evidence touching on the boundaries of two of the Reservations drawn in question before him. Upon its later adoption of most of his report, the Court disapproved of his attempt to adjudicate the boundary lines. The Court said:

> We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, then the dispute can be settled at that time.

373 U.S. at 601. Rather than resolve the boundary dispute then and there, the Court provided for an adjustment in water rights "in the event that the boundaries . . . are finally determined." 376 U.S. at 345. Except

for the boundary disputes mentioned in the Court's opinion, all parties in the original litigation were dealing with boundaries set either by acts of Congress or by executive order. Whatever challenge might have been raised to these, no State Party contested the right of the Court to accept as final and binding *for the purpose of that litigation* such established boundaries. These were all deemed to be final for the purpose of the water allotments then presented to the Court.

The treatment of the boundary disputes suggests an intention similarly to adopt by reference determinations of the disputed boundaries. That it was "unnecessary" to determine those disputes "here" indicates that it was adequate to do so elsewhere. And rather than making some specific provision for the determination of the boundary disputes, *cf. Oklahoma v. Texas*, 256 U.S. 602, 605-07 (1921), the Court merely left its decree open to adjustment "in the event" the disputes were resolved. This conditional language belies any intent to settle the disputes. The language the Court used with respect to a potential dispute, while it concedes the possibility that the Court might be required to settle title disputes, seems clearly to indicate that any dispute with respect to secretarial action would be instituted by a party which was refused water, in other words, a party claiming title to the land, not one seeking a collateral determination of title.[89] It is evident that the Court, in the sparing exer-

89. This reference to the Secretary's "refusal" to deliver water to the disputed areas appears to have contemplated that the Secretary would have discretion to determine whether water should be delivered to the disputed lands. Such discretion is inconsistent with the ultimate decree, which based rights for the Reservations on irrigable acres without involving the disputed lands and enjoined the Secretary from delivering water

cise of its original jurisdiction, contemplated that the boundaries of the Reservations would be determined elsewhere, and such determination relied on for the purpose of allocating water rights.

This conclusion appears particularly appropriate in light of the nature of the dispute in the earlier proceedings. Generally speaking, those disputes concerned conflicting positions within the Interior Department or ambiguities in the description of boundaries. A significant amount of relevant executive action has transpired in the interim.

The various Secretarial Orders have defined the ambiguities or removed the inconsistencies which earlier caused uncertainty. I see no need to further question the boundary determinations in this case. There is really no doubt regarding where the government presently draws the boundary lines between the parcels of public land in question. The disputes presented to the prior Master and the Court no longer exist.

The Court in 1963 rebuffed the earlier Master's attempt to choose from among the various interpretations of the executive department regarding these boundaries. There is no reason to believe that the Court would be more receptive to a present Master's attempt at adjudication of the boundaries. In fact there is good reason to believe that such a course would be more ill-advised today than over twenty

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except in accordance with these provisions. Instead the Decree provided for an adjustment by agreement or decree.

While awarding the Secretary discretion to deliver additional water to the disputed areas would affirm the conclusion that boundary determinations by the Secretary should be accepted as final, limiting that discretion to instances where there is agreement among the parties does not affect the conclusion that the Court preferred that the boundaries of the Reservations be settled elsewhere.

years ago. The Secretary of the Interior has now made definitive executive interpretations which sweep aside inconsistencies and ambiguities. The Secretary has overruled Interior Department actions that were contrary to his determination. If this action had occurred earlier it, to a large extent, would have removed any choice that the prior Master may have had regarding the proper boundaries.

Even if the course of the proceedings in this case did not indicate such a result, the normal treatment of similar situations reveals that secretarial orders resolving those problems are appropriate determinations for adoption by reference in this litigation as a measuring stick for determining additional irrigable acreage. In large part we are concerned with actions by the Secretary of Interior[90] concerning lines surveyed between the public lands of the United States and Indian reservations whose concern is a matter of the highest priority to the United States. The United States, in the exercise of its plenary power to regulate Indian affairs,[91] may establish Indian reservations by executive order. *Arizona v. California*, 373 U.S. 546, 598 (1963).[92] The Secretary and the Interior Department by surveys and other means undoubtedly may determine or correct boundary lines in public lands. *See* 43 U.S.C. §§ 1, 2, 751, 752, 772 (1976). *See also* 25 U.S.C. § 176 (1976). Once determined the boundaries fixed by these

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90. No contention is raised that the Act of Congress, 88 Stat. 266 (1974), extending the boundary of the Cocopah Reservation, is subject to redetermination.

91. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168-69 (1973); United States v. Kagama, 118 U.S. 375, 381-82 (1886).

92. In its 1963 Opinion, the Court counted the creation of the Chemehuevi Indian Reservation by the Secretary of the Interior as the creation of a reservation by Executive Order. 373 U.S. at 596 n.100.

surveys are conclusive in collateral proceedings, because the matter rests within the jurisdiction of the executive branch. *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10, 16-17 (1935); *Stoneroad v. Stoneroad*, 158 U.S. 240, 250-52 (1895); *Knight v. United States Land Association*, 142 U.S. 161, 176-78 (1891); *Cragin v. Powell*, 128 U.S. 691, 698-99 (1888). In fact, the Court explained that its rationale, for the conclusive effect given to the Interior Department's survey, was to eliminate the necessity for a landholder to litigate "in every action at law between itself and its neighbors . . . the question of the accuracy of the survey." *Russell v. Maxwell Land Grant Co.*, 158 U.S. 253, 256 (1895).

> And in the nature of things a survey made by the government must be held conclusive against any collateral attack in controversies between individuals. There must be some tribunal to which final jurisdiction is given in respect to the matter of surveys, and no other tribunal is so competent to deal with the matter as the Land Department. None other is named in the statutes. If in every controversy between neighbors the accuracy of a survey made by the government were open to question, interminable confusion would ensue.

Id. at 258. If the Bureau of Land Management, or its predecessor the General Land Office, 1946 Reorg. Plan No. 3, § 403, 11 Fed. Reg. 7876, *reprinted in*, 43 U.S.C.A. § 1 note (1964), prepared a survey which the courts must regard as conclusive, a dissatisfied litigant might still appeal to the Secretary of the Interior, as has happened in this case. *Stoneroad v Stoneroad*, 158 U.S. 240, 253 (1895); *Knight v. United States Land Association*, 142 U.S. 161, 177-78 (1891); *Snyder*

v. Sickles, 98 U.S. 203, 210-12 (1878); *Wasserman v. Udall*, 234 F. Supp. 651, 654 (D.D.C. 1964). *See also Boesche v. Udall*, 373 U.S. 472, 483 (1963). The Secretary and Interior Department may even resurvey and redetermine the boundaries. *See Lane v. Darlington*, 249 U.S. 331, 333-34 (1919); 43 U.S.C. § 771, 772 (1976). In general, these are precisely the sorts of determinations and proceedings which have occurred within the Interior Department in this case.

Under these principles the Secretarial Orders now in effect determine the boundaries for purposes of this case. The State Parties contend that the Interior Department's powe: to make a "land survey is far different from resolving a complex boundary dispute involving questions of law and fact."[93] But such a statement ignores the nature of the dispute, if any. As the parties have argued the case the boundaries in question separate parcels of federal public land. The purpose of the boundaries is to designate the extent of land within the several Indian Reservations as created by the federal government.[94] The Secretary of the Interior whose duty it is to determine the boundaries of Indian land may issue orders which, while not reapportioning land

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93. Response of State Parties to the Motion of the United States for Modification of Decree 15 (Feb. 1979).

94. There have been frequent assertions in this case that the presently-questioned boundaries divide only parcels of federal public land. *See generally* Transcript of Oral Argument in Supreme Court, *Arizona v. California* 62 (Oct. 10, 1978); Motion of the United States for Modification of Decree and Supporting Memorandum 13 (Dec. 1978); Special Master's Memorandum and Report On Preliminary Issues 39-40 (Aug. 28, 1979). The State Parties have not questioned these assertions in any manner that would clearly put such an issue in contest. *See* Response of State Parties to the Motion of the United States for Modification of Decree 11-25 (Feb. 1979); Motion of State Parties for Leave to File Exceptions to Memorandum and Report of Special Master; Exceptions; and Opening Brief 29-30 (Nov. 1979).

with respect to either federally-owned parcel, do establish conclusively what has always been the actual boundary. 25 U.S.C. § 176 (1976); *Pueblo of Taos v. Andrus*, 475 F. Supp. 359, 367 n.7 (D.D.C. 1979). *Cf. French v. United States*, 49 Ct. Cl. 337, 346-47 (1914) (Interior Department surveys conclusively determine boundaries of Indian reservations when such a question is collaterally in issue at trial). *See also* 42 Op. Att'y Gen. 441, 452-53 (1972).

The State Parties asserted only that a present review of the Secretarial Orders by a Master and the Court would prove them to be invalid or incorrect because the Secretary was wrong in his determinations.[95] Although the federal government, through properly issued Secretarial Orders,[96] may concede, for all purposes, that the lands are held in trust for the Tribes, rather than held in some other federal capacity, the State Parties ask the Court to order the federal government to draw its boundary to exclude these lands, at least for the purpose of water rights. Such a conclusion seems patently unreasonable. Under these circumstances, the Secretarial Orders and the surveys which conform thereto, should be taken as legally operative authority determining the boundaries between the Reservations and other federal public land. Because the issue of boundaries arises as a collateral matter in this lawsuit the boundaries drawn by the Interior Department should be accepted as conclusively showing

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95. Response of State Parties to Motion of the United States for Modification of Decree 13 (Feb. 1979) (invalidity); Memorandum of the Urban Agencies re the Indian Reservation Boundary Question 5-10 (Apr. 1979) (correctness). *See* Transcript of Formal Hearing in San Francisco, Arizona v. California 80, 91-103 (Apr. 17, 1979).

96. Transcript of Formal Hearing in San Francisco, Arizona v. California 80, 93 (Apr. 17, 1979).

that fact at this time.[97] Under these principles, there was no issue for trial when there was no dispute over the acreage covered by the Secretarial Orders.[98]

The State Parties are not necessarily foreclosed from challenging these orders. Rather the questions raised by the State Parties appear more properly raised in a direct proceeding. *See Cragin v. Powell*, 128 U.S. 691, 699 (1888); *Steel v. Smelting Co.*, 106 U.S. 447, 453-55 (1882). Such a conclusion is also suggested by the type of review the State Parties sought of the

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97. There is authority which indicates that Interior Department action such as surveys cannot limit an Indian reservation to a smaller area than originally set aside for the Indians. *See* Northern Pac. Ry. v. United States, 227 U.S. 335, 366-67 (1913); Sekaquaptewa v. MacDonald, 626 F.2d 113, 118 (9th Cir. 1980); United States v. Romaine, 255 F. 253, 260 (9th Cir. 1919). Perhaps such a reason motivated the Court to reject the prior Master's findings that land department surveys and other Interior Department action limited permanently the extent of the Reservations' water rights. *See* SPECIAL MASTER'S REPORT at 274-78, 283-87. The Tribes do not now allege that any lands in the particular areas are erroneously excluded from the Reservations by the Secretarial Orders.

98. Similarly, I conclude that the two court decisions affecting respectively the Cocopah and Fort Mojave Reservations should be treated as final for present purposes. Certainly the Interior Department accepts those boundaries as affected by the decrees. Any challenge by the State Parties to these boundaries should proceed in a manner similar to the contests regarding the other boundaries. The most complete articulation of the State Parties' opposition on this issue was that they should be "free to adjudicate the proper boundaries in a separate action to establish water rights which depend, in part, on the true reservation boundaries." Motion of the State Parties for Leave to File Exceptions to the Memorandum and Report of the Special Master; Exceptions; and Opening Brief 25 (Nov. 1979). Given that such an expression is as far as I understand their argument to extend, the State Parties' failure to propose any persons with a colorable claim to the land makes it appear that if those decisions are not final by now the United States and the Tribes might need to wait indefinitely for a claimant who is not precluded to appear. The alternative of relitigation over the "true boundaries" with the State Parties opposing the Tribes makes little sense, absent further explanation, when those persons with a colorable claim have surrendered.

Secretarial Orders in this action where the question was raised collaterally.[99] Perhaps the State Parties are correct in arguing that the Interior Department's action constitutes agency action creating a legal wrong for which they are entitled to judicial review under the Administrative Procedure Act, 5 U.S.C. § 702 (1976). The appropriate standard of review[100] and the question of the appropriate time-bar[101] were questions not resolved here. But it would appear that for such action to be undertaken in the original jurisdiction of the Supreme Court would be highly unusual.

Moreover, the present inquiry regards water rights only. The actions upon which the boundary lands claims rest should be challenged in a direct action where their validity or correctness may be tested for all purposes.[102] Absent such a direct challenge the boundaries stand determined by the various proceedings described in the United States' motion. If the boundaries are not accorded finality for purposes of this litigation, the Tribes might be required to wait in-

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99. *See* notes 95-96 *supra*.

100. The United States argued that the arbitrary and capricious standard would apply. Memorandum of the United States on Preliminary Issues 9 (Apr. 1979). The State Parties proposed no standard but would have accorded the orders far less deference. Transcript of Formal Hearing in San Francisco 80, 93 (Apr. 17, 1979).

101. Only upon the fulfillment of the water rights claims would the agency action affect the State Parties. *See* Nuclear Data, Inc. v. AEC, 344 F. Supp. 719, 727 (N.D. Ill. 1972).

102. The State Parties express concern regarding their standing to raise these issues elsewhere. *See* Motion of the State Parties for Leave to File Exceptions to the Memorandum and Report of the Special Master; Exceptions; and Opening Brief 33-35 (Nov. 1979). Those parties would appear to be injured by the agency action and thus have standing. The more doubtful proposition would appear to be their ability to establish that the federal government may not draw its boundaries as they have been drawn.

definitely, as one Secretarial Order has now stood unchallenged for over ten years.

The State Parties argue that such analysis would depart from the practice of the prior Master who took evidence on the issue of the boundaries.[103] Such an assertion ignores the prior Master's finding that a land department survey was conclusive and not subject to collateral attack when the issue of a reservation boundary is collaterally in issue.[104] The current Secretarial Orders will control his subordinates' actions. If all parties before the prior Master had admitted the existence of such orders delimiting a Reservation to a specified number of acres, his analysis would have made unnecessary the taking of evidence on the issue.

Neither the power of the Secretary or of the courts to make boundary determinations nor the Court's intent to have these determinations made by such decisionmakers, if possible, is diminished by the State Parties' contention that they did not have their "day in court" before these decisionmakers. I am aware of no claim to land in any of the disputed areas by any of the State Parties. Their interest lies only to the extent that if some other party — or they themselves as aggrieved persons or intervenors in proceedings elsewhere now pending or commenced — should successfully contest the boundaries as now fixed by Secretarial Order or the title to the land within these boundaries, the allotments of water now sought on behalf of the Tribes would be reduced. Title questions are different from those boundary issues discussed above. *See Borax Consolidated Ltd v. City of Los Angeles,* 296 U.S. 10, 16-21 (1935); *United States v. State*

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103. *Id.* at 30.

104. SPECIAL MASTER'S REPORT at 283-87.

Investment Co., 264 U.S. 206 (1924). But the private contestants for title do not present a new problem to this case. This concern can be met by the inclusion in the final decree of the Court of a provision that would reduce the allotment now sought on behalf of the Tribes *pro tanto* for lands found to be practicably irrigable which subsequent litigation determines not to be Indian land. The Court previously adopted this method to provide for land associated with the Fort Mojave Reservation and determined to have been conveyed to California and to the Southern Pacific Railroad. *See* 376 U.S. at 345. This procedure, having once gained the Court's approval, provides a common sense solution to the problem of accounting for whatever land within the Interior Department's boundaries ultimately may be determined to belong to non-Indians.[105] Such a solution would additionally accommodate any future changes in the boundaries.

In sum, I agree with the position put forward by the United States that:

> It would be wholly arbitrary to consider the Reservation boundaries as they were understood in 1964 to be sufficiently "determined" to support a specific water allocation calculated on acreage — albeit no court judgment has ever vindicated the survey — but to deny comparable affect [sic] to subsequent dependent surveys of the boundaries because no court had approved them.[106]

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105. I note that some private litigation continues regarding these Reservations. *See, e.g.*, United States v. Aranson, No. 77-2295 (9th Cir. Mar. 30, 1981), *withdrawn* (Apr. 17, 1981).

106. Motion of the United States for Modification of Decree and Supporting Memorandum 13-14 (Dec. 1978).

I also agree with the State Parties that adjustments in tribal water rights should be considered now rather than await piecemeal litigation, so that some stability and predictability in the allocation of water rights can be reached.[107]

Subject, therefore, to a proviso which would reduce the allocations which I eventually recommend on account of the enlarged recognized boundaries on the basis of any valid court decisions withdrawing any lands from the Reservations as now defined, I shall accept the boundary changes set forth in the motion by the United States filed on December 22, 1978, as having been finally determined within the meaning of the Court's 1964 Decree and Supplemental 1979 Decree.

C. *Miscellaneous Boundary and Related Problems*

1. *Fort Mojave Reservation Boundaries*

(a) *United States Claims*

The United States claims for water rights on the Fort Mojave Reservation are met by the State Parties with the challenge that the United States has not demonstrated that substantial relevant acreage is within the Reservation boundaries. The State Parties'[108] engineer testified that several isolated parcels were neither in the boundaries recognized in the earlier proceeding[109] nor my order of August 28, 1979[110] and thus the United States had no basis for drawing

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107. *See* Response of the State Parties to Motion of the United States for Modification of Decree 20-25 (Feb. 1979).

108. State Parties' Post-Trial Opening Brief 224-25 (May 1981).

109. *See generally* Pr. U.S. Exhs. 1317, 1318.

110. *See generally* Special Master's Memorandum and Report on Preliminary Issues (August 28, 1979).

the boundaries as depicted on the present exhibits.[111] The United States counters with the testimony of their expert who stated that he took the boundaries for his maps as given by the BIA.[112]

This state of the record does not present a sufficient basis for an award of water rights with respect to these disputed parcels. The United States has simply presented evidence that the Interior Department has not yet finally resolved these boundaries because the exhibits tendered by the United States in the earlier proceedings conflict with those presently tendered. No satisfactory explanation is offered for this discrepancy. The Court found that the prior Master's attempt at the resolution of such a conflict was "unnecessary" and I see no reason to follow a once disapproved course.

The United States claims may be discussed in two parts.

(i) *Intermediate Tract*

The first dispute centers on what is known as the Intermediate Tract of the Fort Mojave Reservation. It lies between the northerly portion of the Reservation known as the Old Post Reserve, which is almost a square figure, and the central portion known as the Hay and Wood Reserve, which is an irregularly-shaped rectangle. These three tracts, which were originally part of the old military reserve created in 1870, became an Indian Reservation in 1890 by executive order.[113] The Intermediate Tract lies:

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111. *See* Tr. 5255 *et. seq.*; S.P. Exh. 159.

112. Tr. 579-81.

113. Executive Order of March 30, 1870, General Order No. 19 of the War Department of August 4, 1870; Executive Order of September 19, 1890. *See* 2 EXECUTIVE ORDERS RELATING TO INDIAN RESERVATIONS: FROM

> between the military and the hay and wood reservations bounded on the west by the Colorado River and on the east by a line running from station No. 1 of the hay and wood reserve to station No. 1 of the military reserve.

The Associate Solicitor of the Interior Department has stated that: "This 'intermediate tract' clearly belongs to the tribe."[114] That statement seems indisputably correct but our present inquiry concerns the more murky question of the proper location of that tract's western boundary along "the Colorado River."

The dispute between the United States and the State Parties over this tract involves a puzzling set of facts. The United States in the hearings before the prior Master introduced into evidence maps purporting to show the Reservation boundaries as well as acreage claimed to be irrigable.[115] Remarkably, some of the acreage on the Intermediate Tract for which water rights were requested, as shown on the maps, lies outside the boundaries as shown on the same maps.[116] Although the State Parties objected to the United States' claims concerning the boundaries of other parts of the Reservation, the Intermediate Tract apparently suffered no similar attack and even those claimed areas outside the western boundary apparently received

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MAY 14, 1855 TO JULY 1, 1912 12 (1912) (hereinafter cited as Executive Orders). The 1890 order and accompanying papers apparently omitted mention of the Intermediate Tract although the two other parcels clearly became Indian land. This oversight was remedied in 1903 when the tract was recognized to be a part of the Indian Reservation. *Id.*

114. Memorandum, April 12, 1974, Associate Solicitor, Indian Affairs to Solicitor of the Department of the Interior, Boundary of the Fort Mojave Hay and Wood Reserve 6b n.1.

115. *See* Pr. U.S. Exhs. 1317, 1318.

116. *See id.*

water rights.[117] In the present proceedings the State Parties' expert testified that he could not determine the status of those then-claimed areas west of the boundary as drawn on the map.[118] And the United States asserts that it cannot solve this riddle either.[119] The State Parties, however, do not claim that any acreage was erroneously considered in 1964 to be within the Reservation boundaries. Thus, the present contest concerns only presently-claimed water rights on specified acres. These acres lie to the west of the boundary shown on the old exhibits. But those acres lie east of the boundary shown on the present exhibits. The United States apparently believes the boundary lies further west than was shown on the older exhibits.

This dispute concerns the relative correctness of the various depictions of the western boundary as it was originally set by the River. If the State Parties are correct, the boundary lies to the east of the present river channel and follows the boundary shown on the prior exhibits. If the United States is correct, the boundary lies roughly along the western edge of several islands which lie closest to the eastern bank of the River as shown on the prior exhibits.[120] A boundary marked by a river is not necessarily constant. Depending on the type of river movement, the land area within a legal boundary may increase, decrease, or remain constant.

I have no basis for deciding precisely where the proper boundary now lies, because there is no evidence in the record of the River's former location(s) or of the

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117. *Compare* Pr. U.S. Exhs. 1317, 1318, 1320, 1321, 1322 *with* Pr. Calif. Exhs. 3515, 3516, 3517.

118. Tr. 5299-300.

119. United States' Post-Trial Opening Brief 15 (May 1981).

120. *See* Pr. U.S. Exh. 1318.

types of movement which brought it to its present channel. The United States has in this case introduced conflicting maps of the western boundary of this tract. Both the older map[121] and the newer one[122] were allegedly based on boundary descriptions from such sources as the BIA and the General Land Office. Other than the testimony indicating that the boundaries of the Reservation were given by the BIA, there is no evidence showing that these boundaries presently claimed by the United States are officially recognized. The United States offers no reason for according this view any greater weight than the evidence of official recognition of a more restrictive boundary produced by the United States in the 1950's. Moreover, in light of the history of this case and my previous discussion of the more general boundary issues, I am persuaded that this is not an appropriate issue for resolution in this forum. If the United States is correct in its argument that the prior "Master ought not to have attempted to do the job of the Secretary of the Interior" by deciding which of the then-purported boundaries was accurate, I should not now undertake such a task.

In view of the confusion surrounding this issue, I believe that the various legal and factual questions concerning the proper location of this river boundary should be first resolved by a definitive ruling from the Interior Department before an award for water rights can be made.[123] Until the Interior Department acts

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121. *See* Pr. U.S. Exh. 1317.

122. *See* Tr. 579-81; U.S. Exh. 3. In fact the United States' soils expert prepared a map in November, 1979 which indicated that this boundary was "indefinite." *See* Ariz. Exh. M.

123. The United States claims these lands as "omitted lands." *See* U.S. Exh. 42, Table 7. That description seems inaccurate since the United States has defined "omitted lands" to be "lands which were con-

more definitively, I cannot find that this boundary question involving a river boundary has been "finally determined," particularly in light of the different positions asserted in the evidence rendered by the United States. 376 U.S. at 345.

(ii) *Checkerboard Area*

The second dispute over the Fort Mojave Reservation boundaries concerns the southerly portion of the Reservation sometimes known as the Checkerboard Area because this general area in Arizona contains sections of land that are alternatively within and without the Reservation.[124] The State Parties have questioned whether several parcels, adjacent to the Reservation sections as shown on the prior exhibits,[125] are within the Reservation as recognized for these proceedings.[126] The United States contends that the lands are boundary lands and that the BIA believes that the areas are within the Reservation.[127]

In light of the discussion contained in the just preceding section, a relatively brief treatment of this issue will suffice. The Checkerboard Area was added to the Fort Mojave Indian Reservation by Executive Order in

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ceded to be within the several Reservations at the time of the original proceedings" and there is no evidence that these lands were subject to such a concession. *See* Motion of the United States for Modification of Decree and Supporting Memorandum 23 (Dec. 1978). Neither are these lands truly "boundary lands" that were "once treated as being outside the Reservations but since determined to be within their true boundaries." *Id.* at 6.

124. *See* Pr. U.S. Exhs. 1317, 1318.

125. *See id.*

126. *See* Tr. 5255 *et seq.*; S.P. Exh. 159.

127. United States' Post-Trial Opening Brief 16 (May 1981).

1910.[128] This reserve was modified two months later in 1911 and certain parcels were deleted from the prior reserve.[129] For example, at the prior hearings, section 30, T. 17 N., and section 36, T. 17 N., were originally claimed by the United States to have been within the Reservation boundaries.[130] But testimony revealed that these two parcels were deleted from the Reservation by the Executive Order of 1911.[131]

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128. *See* Executive Order of December 1, 1910, *reprinted in* 2 EXECUTIVE ORDERS 13.

129. *See* Executive Order of February 2, 1911, *reprinted in* 2 EXECUTIVE ORDERS 13-14.

130. *See* Pr. U.S. Exhs. 1317, 1318.

131. *See* Pr. Tr. 14172-74, 20375-76; Pr. Calif. Exhs. 3515, 3516, 3517. This reduction did not involve two full sections of land, but amounted to only 1,037 gross acres of which 847 were classified as irrigable. *See* Pr. Calif. Exh. 3516. The net irrigable acres claim was thus reduced by 762 acres. *See* Pr. Calif. Exh. 3517.

The maps of the claimed acreage also show what appears to be a fractional section (apparently section 16) just southwest of section 10, T.17, N., claimed to be irrigable and within the Reservation boundaries. Yet the Executive Order of February 2, 1911 does not appear to include any portion of this section within the Reservation. And this fact was recognized by the United States in the earlier proceedings. Pr. Tr. 14069-71. But no information presented by the parties touches directly upon this matter. This fractional section is apparently decreed land, unless some correction was made which has not come to my attention. The United States apparently believes that the land was given water rights earlier because the United States does not indicate that this section was one of the sections for which the water rights claim was disallowed in the earlier hearings. *See* Memorandum on Areas on Ft. Mojave Reservation Considered Before Special Master Rifkind, (Sept. 1980) record item no. 92. The State Parties appear to hold this view as well. *See* Tr. 5277. But the United States has apparently requested water rights again for part of this fractional section as part of Unit FM-12 despite its apparent prior success on this issue in the earlier proceedings. *See* U.S. Exh. 3. The State Parties claim this decreed land (72 gross acres) cannot again be awarded water rights. *See* S.P. Exh. 160 n.b. That statement is correct. But the State Parties do not advance even further and claim that this land is not within the Reservation boundaries recognized in the 1911 Executive Order. Because the parties have not raised this issue of whether

The State Parties now claim that areas adjacent to the alternate sections of the Checkerboard Area Reservation land are not within any formal boundary adjustment claimed by the United States.[132] The United States believes that these irregularly-shaped areas should now be included within the Reservation boundaries even though they were not so recognized in the prior proceedings.[133] But the United States offers no clear basis for this adjustment.[134] And these irregularly-shaped areas do not appear to be included in the Reservation by the 1911 Executive Order. The State Parties' explanation of the reasons for the present confusion is apparently not in the record,[135] except to the extent that they believe the United States has not sufficiently supported its position. Given this situation the United States has merely introduced evidence that conflicts with its previously introduced evidence over the proper boundaries for this area of the Reservation. Without more dispositive evidence I cannot conclude that the boundaries have been determined to be larger than recognized in the earlier proceedings.

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this 72 acres should now lose its water rights, if any, I will ignore this possibility.

132. *See* Tr. 5255 *et seq.*; S.P. Exh. 159.

133. *See* Tr. 5302-05.

134. Perhaps, as the United States suggested, there has been some sort of a trade between these lands and others. The Executive Order of 1911 appears to grant more land in the southerly portion of the Checkerboard Area than shown on U.S. Exh. 3. But the United States points to no such formal adjustment.

135. *See* Tr. 5302.

(iii) *Adjustment to the United States Claims on the Fort Mojave Indian Reservation*

My agreement with the State Parties' view, regarding certain parcels that lie outside the Fort Mojave Reservation boundaries as they were recognized by the prior Master or as they have been officially recognized in subsequent years, necessitates an adjustment of the United States claims from the beginning of my analysis. The State Parties have offered uncontradicted evidence that the United States has claimed that 1,075 gross acres of such land is practicably irrigable.[136] In some minor respects this figure might be inaccurate.[137] These inaccuracies are not fatal in any event because some adjustment must be made. And the United States may offer evidence correcting such inaccuracies at some time in the future.

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136. *See* S.P. Exh. 160. This figure includes the 72 gross acres which the State Parties allege were awarded water rights in 1964. *See id.* at n.b.

137. For example, the State Parties' figure does not account for any non-arable land which might be subject to another adjustment in a subsequent part of my report. As a consequence of such a possibility of overlapping adjustments, there must be a minor difficulty.

In addition, the areas designated on S.P. Exh. 159 do not entirely coincide with the relevant areas. For example, the State Parties have, I believe, indicated too large an area of Unit FM-2 to be outside the boundaries recognized by the prior Master. The State Parties' exhibit indicated a southwestern boundary of the old Post or Military Reserve that implicitly terminates approximately in the middle of the present channel of the Colorado River. The southwestern boundary should be drawn to a length equal to that of the northeastern boundary of the old Post Reserve. *See* Pr. U.S. Exhs. 1317, 1318, 2 EXECUTIVE ORDERS 12. If the southwestern boundary of the nearly-square Old Post Reserve is extended southeasterly until its length equals that of the opposite boundary, the southeasterly boundary will intersect FM-2 at a more southerly point than depicted on S.P. Exh. 159 and some amount of the land appears to have been erroneously excluded by the State Parties.

S.P. Exh. 159 also fails to show that the northern tip of FM-7 lies in the disputed zone, which I believe it does.

My factual findings regarding the practicable irrigability of the Reservation lands should be taken to apply to these lands regardless of my views on this boundary question. The parties have gone to a great deal of time and expense to litigate the irrigability of all these lands. If the areas are later determined to be within the Reservation my findings as they apply to these lands may be reinstated at that time.

(b) *Fort Mojave Tribe's Claims of Error*

The Fort Mojave Tribe has also raised claims which might naturally be discussed in the context of the boundary disputes regarding the Fort Mojave Indian Reservation. The Tribe in the hearings filed an expert report which purported to discover two errors in the original findings of this case.[138] First, the report alleged that a measurement error caused the United States to claim 1,776 too few acres as irrigable. Second, the report claimed that a large portion of the land, 1,069 acres, with decreed water rights, was not within the Reservation's boundaries. Neither claim is persuasive.

The State Parties disputed the first claim at trial.[139] The Tribe did not brief the question and merely asserted a claim that 1,739 gross acres on the Reservation are irrigable beyond those acres claimed by the United States.[140] This figure apparently does not allow for any adjustment for a previous error. In any event, the State Parties' position appears to be the

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138. *See* F.M. Exh. 2, at 5-9.

139. *See* Tr. 5268 *et. seq.;* S.P. Exh. 162.

140. Four Tribes' Opening Post-Trial Brief 82 (May 1981). *See* F.M. Supp. Exh. (Sept. 1981), record item no. 192.

most accurate.[141] I find that there was no such mistake as alleged by the Tribe.

The second claim of error in the Tribe's expert report is apparently not discussed in any of the briefs. I hesitate to discuss an unbriefed issue, but for the record I will briefly indicate my views on this subject. The areas alleged to have decreed rights are depicted upon a map accompanying the expert's report.[142] The majority of the land depicted as erroneously receiving decreed rights did not in fact receive such rights. As discussed above, two sections in Arizona (sections 30, 36 in T. 17 N.) were originally claimed by the United States.[143] But at the earlier trial the State Parties discovered that those lands were not included within the Reservation under the 1911 Executive Order, and the United States claims were reduced.[144] Thus, those lands do not have decreed water rights. Two smaller areas are shown by the Tribe to have been subject to the same mistake. These lands are apparently ac-

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141. The Tribe's expert apparently took his figure from the table appearing on Pr. U.S. Exh. 1318 because that map contains the figure of 22,147 gross irrigable acres referred to in the expert's report, F.M. Exh. 2, at 6. The resulting calculations of that expert thus fail to account for the substitution made by the United States at the prior hearings. The table on Pr. U.S. Exh. 1318 was excluded from evidence and Pr. U.S. Exh. 1321 was substituted for the figures on the table on the map. *See* Pr. Tr. 14245-47. The corrected figures on Pr. U.S. Exh. 1321 reveal that 23,639 gross irrigable acres were considered on the Reservation. In addition, another 367 gross acres of nonirrigable land lay in the irrigation units. The total then before the Court was 24,006 gross acres. The present expert's estimate that there were really 23,923 such acres portrayed on the map is within the expected margin of measurement error. Tr. 5271. Certainly 1,776 acres were not missing. Subsequent adjustment did occur to the 24,006 acre total to reach the total for which water rights were decreed.

142. *See* Map. No. 1, F.M. Exh. 2.

143. *See* Pr. U.S. Exh. 1318.

144. *See* Pr. Tr. 14172-74.

knowledged by the United States to be outside the Reservation boundaries.[145] But there is no evidence which shows the number of acres within these parcels and my attention has not been called to information indicating whether an adjustment may have previously occurred to prevent these non-Reservation lands from receiving decreed Indian water rights. I leave this issue to future contest upon the State Parties' motion.

2. *Adjustments on the Colorado River Indian Reservation*

The State Parties assert that the irrigable acreage on two portions of the Colorado River Indian Reservation was miscalculated in the prior proceedings. They claim that a survey by the Bureau of Land Management revealed that the "Ninth Avenue Loop" and the "Olive Lake Loop" contain 72 and 146 net acres less than previously thought to be within these parcels.[146] The United States stipulated to the factual accuracy of these figures.[147] In my view, Article IX of the 1964 Decree permits the correction of such an error, and I find that the decreed water rights for this Reservation should be adjusted accordingly.

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145. *See* U.S. Exh. 3. The two parcels lie respectively immediately 1) south and 2) southeast of the decreed lands in section 24 of T. 17 N. *Compare* Pr. U.S. Exh. 1318. The parcel which is closer to the River may have been discovered to have been outside the Reservation, but I do not know if any adjustment was made. Pr. Tr. 14069-71.

146. *See* Tr. 5262-64; S.P. Exh. 161. The decreed acreage was 222 net acres for the Ninth Avenue area and 2,058 net acres for the Olive Lake area. *See* SPECIAL MASTER'S REPORT at 271-72. The new figures would be 150 and 1,912 net acres respectively for these parcels. *See* S.P. Exh. 161.

147. *See* Tr. 5262-64.

III. Proof of the Case

A. *Standard of Proof*

The United States and the five Tribes have sought to prove that certain lands are practicably irrigable. They bear the burden of persuasion. The State Parties have asserted that the claimants must establish their asserted points by a preponderance of the evidence.[1] This is the standard of proof which I believe to be clearly appropriate and which I shall use to judge all claims. I must necessarily reject the State Parties' accompanying suggestions that the seriousness of this litigation and the uncertain nature of the subject matter somehow transforms the burden of persuasion into a greater standard variously phrased by them as "reasonable certainty," "high standard of proof," "very high standard," and "clear and convincing evidence."[2] In fact, the State Parties ultimately argue that the Tribes must "resolve all doubts in their favor or see their claims rejected."[3] These standards are clearly inappropriate. All litigation constitutes serious business and any departure from the use of the civil case standard of preponderance of the evidence would inject unnecessary confusion into an already complicated case. The proof which I shall accept for my findings will be the more convincing evidence on any given element, including such elements as may be difficult to prove.

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1. State Parties' Post-Trial Opening Brief 6 (May 1981).
2. *Id.* at 8, 79, 99, 186.
3. *Id.* at 186.

B. *The Quantification Standard—The Meaning of Practicably Irrigable*

1. *General*

The present Indian Reservations clearly possess reserved water rights under the doctrine traced to the landmark decision of *Winters v. United States*, 207 U.S. 564 (1908). The more difficult question concerns the quantity of water reserved.

Prior to the earlier proceedings in this case, courts had reached various quantification standards. The goal was undoubtedly to reserve enough water to satisfy the Indians' present and future needs. The accomplishment of that goal was met by various schemes. For example, a fixed decree giving the Indians an amount of water historically used was possible if circumstances clearly showed that the future needs will not increase. *United States v. Walker River Irrigation District*, 104 F.2d 334, 340 (9th Cir. 1939). Under other circumstances the Indians had been entitled to enough water to irrigate all irrigable reservation land. *Skeem v. United States*, 273 F. 93, 95-96 (9th Cir. 1921); *United States v. Hibner*, 27 F.2d 909, 911 (E.D. Idaho 1928). Indeed, courts had held that Indians may be entitled to such water as is required to meet present needs with the qualification that if their needs increase such Indians may apply to the Court for an increase in the decreed amount. *Conrad Investment Co. v. United States*, 161 F. 829, 832-35 (9th Cir. 1908); *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 326-28 (9th Cir. 1956), *on appeal from district court decision on remand*, 330 F.2d 897 (1964). No standard was definitive for all cases.

The earlier proceedings in this case concerned the same issue. The former Special Master and the Court eventually settled upon a standard which most nearly satisfied all concerns relevant to the parties. The United States desired for the Indians enough water to satisfy their present and future needs. Such water would be needed to fulfill the very purpose of the Reservations and to make those lands livable. A relatively stable allocation to the Tribes would also allow other water users better opportunities for planning. The Court, thus, concluded that "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." 373 U.S. at 601. In such a holding, the Court adopted the "practicably irrigable" standard used by the Special Master. *See id.* at 600-01. That quantity of water equalled the amount required to make the Reservations livable. *See Montana v. United States*, ___ U.S. ___, ___, 101 S. Ct. 1245, 1258 n.15 (1981); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 685-87 (1979). Although the Court did not necessarily adopt this standard as the universal measure of Indian reserved water rights,[4] it constitutes the law of this case for the five Reservations under consideration.[5]

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4. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 70-71 (1966).

5. The State Parties have urged a new standard based on the quantity of water necessary for a moderate standard of living. State Parties' Motion to Include for Consideration the Standard of Living of the Tribes (June 1980), record item no. 54. Of course, the prior Master rejected such arguments which would tie the quantity of water to present needs. SPECIAL MASTER'S REPORT at 263-65.

The irrigable acres standard has been criticized by others as being too generous to the Indians, because, for example, there was some evidence in the earlier proceedings that only 23 acres of the Fort Mojave Reservation had ever been irrigated and only one family then lived on the Reser-

That this standard should now be applied as requested by the United States and the Tribes is supported by recent events in this case. The practicably irrigable standard was recently reaffirmed by the Court in the 1979 Decree which provided, regarding the quantity of water rights for boundary lands, that:

> Additional present perfected rights so adjudicated by such [boundary land] adjustment shall be in annual quantities not to exceed the quantities of mainstream water necessary to supply the consumptive use required for irrigation of the practicably irrigable acres which are included within any area determined to be within a reservation by such final determination of a boundary and for the satisfaction of related uses. The quantities of diversions are to be computed by determining net practicably irrigable acres within each additional area using the methods set forth by the Special Master in this case in his Report to this Court dated December 5, 1960, and by applying the unit diversions quantities thereto, as listed below:

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vation. Shrago, *Emerging Indian Water Rights: An Analysis of Recent Judicial and Legislative Developments*, 26 ROCKY MTN. MIN. L. INST. 1105, 1113-14 & n.36, 1136 & n.105 (1980); Note, *A Proposal for the Quantification of Reserved Indian Water Rights*, 74 COLUM. L. REV. 1299, 1312 & n.80 (1974). *See* Pr. Tr. 14100-02, 14140, 14157-57-A. Even if these statements were true at the time, the present evidence shows that several hundred members of the Tribe reside on the Reservation and that much of the Reservation is under agricultural development. *See* Tr. 1383-91; U.S. Exhs. 43, 44. Decreed water rights for the Reservation have undoubtedly made the Reservation more livable for and attractive to the Indians. Moreover the irrigable acres standard was adopted to represent the present *and future* needs of the Indians. And if the Indians do not consume the water, it remains in the River for others to use.

Indian Reservation	Unit Diversion Quantity Acre-Feet Per Irrigable Acre
Cocopah	6.37
Colorado River	6.67
Chemehuevi	5.97
Ft. Mojave	6.46
Ft. Yuma	6.67

439 U.S. 421-22. Although this guidance was explicitly applicable to water rights for boundary lands, I believe that it should be used to quantify any additional water rights which might be awarded the five Indian Reservations under consideration.[6] Furthermore, any present determination regarding the definition of practicably irrigable acreage appears linked by the above-quoted language to the methods used by the prior Master as he specified them in his Report and as he implicitly based his decisions upon the evidence then before him.[7] The parties have, consistent with this view, sought to present evidence which conforms, as close as is reasonably possible, to the general methodology used previously. Of course, over the years changed conditions and the normal difficulties of reconstructing events of over twenty years ago have thwarted a perfect match. In addition, the parties are not entirely in agreement regarding the interpretation to be given the prior record.

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6. Although the quantity of water rights is to be determined by the amount of irrigable acreage, the reference to irrigable acreage does not constitute a restriction on the usage of such rights. 439 U.S. at 422.

7. Some of the "methods" of the prior Master are not explicitly set forth in his Report. *See* SPECIAL MASTER'S REPORT at 254-87. Rather such matters as the means of determining net acreage and the definition of practicably irrigable are revealed only by the testimony and physical evidence upon which he based his findings.

Subject to the State Parties' opposition to reopening the Decree, and their other motions filed in the pre-trial stages of the present proceedings, all parties concede that the Indians may receive sufficient water to irrigate all[8] reservation land that is "practicably irrigable." Seventeen years after the 1964 Decree, the parties' differences have narrowed to a disagreement over the proper definition of that phrase. There are two principle disputes over the appropriate definition. First, all the parties are in various stages of disagreement over the relevance of economics to the definition. Second, the State Parties at least implicitly also disagree with all other parties regarding the date of the technology which should control a finding of feasability. Each of these questions must be resolved as nearly as possible with reference to the prior proceedings of this case.

Not every detail can be specified in any opinion. The parties agree that neither the Special Master nor the Court defined the phrase "practicably irrigable."[9] But many parties have presented different definitions of that phrase. First, the Quechan Tribe of the Fort Yuma Indian Reservation has consistently maintained that studies of economics are almost irrelevant to the definition which to their thinking is limited to findings

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8. The State Parties contended at the pre-trial stage that accreted land should not be granted water rights. *See* State Parties' Motion to Exclude From Consideration All Lands Which Have Accreted Since the Time the Five Reservations Were Established (June 1980), record item no. 57. Because the 1964 Decree awarded water rights to accreted lands, I believe that a similar course should be followed presently. *See* SPECIAL MASTER'S REPORT at 272 & n.32.

9. United States' Opening Post-Trial Brief 46 (May 1981); State Parties' Post-Trial Opening Brief 5 (May 1981); Trial Brief of Quechan Tribe 7-8 (Sept. 1980); Four Tribes' Post-Trial Reply Brief 6 (Aug. 1980).

regarding arability of the soil and physical engineering feasibility of the projected irrigation projects.[10] The other Four Tribes, to some extent, join this position by stating that not all the costs of the irrigation projects should be considered in determining what amount of land is "practicably irrigable."[11] The State Parties and the United States agree that the land must be arable and the project within engineering feasibility. But they would impose one further requirement for a finding of "practicably irrigable." Between themselves, the United States and the State Parties agree that economic feasibility is the appropriate general inquiry.[12] But those parties have some minor differences in theoretical approach and the application of principles to specific cost items. Each party has designed its evidence to some degree to fit its theory of the case.

After studying the record of the proceedings before the former Special Master, I conclude that "practicably irrigable," as used by the parties and Court in the prior proceedings, very nearly means "economically feasible." The testimony at the prior hearings reveals that the United States submitted for consideration only lands that its experts believed to possess the characteristics necessary for the benefits from irrigated farming to exceed costs.[13] In fact, the Master and the witnesses called their analysis a study of "economics" or "economic feasibility."[14] The testimony further

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10. Trial Brief of Quechan Tribe 6-33 (Sept. 1980).

11. Four Tribes' Post-Trial Reply Brief 6-9 (Aug. 1980).

12. State Parties' Post-Trial Opening Brief 5-6 (May 1981). *See* Pre-Trial Order, II.A.1-9, record item no. 69.

13. Pr. Tr. at 12763-74, 13241-49, 13265-71. The feasibility tests may not have been done in detail, but the testimony definitely indicates that a benefit-cost analysis was the standard then used as it was for the other federal projects studied by the United States experts. Pr. Tr. 13238-39.

14. *See, e.g.*, Pr. Tr. 12771, 13247, 14120.

reveals that the standards used by the experts generally conformed to Bureau of the Budget Circular A-47 which was the general standard used to measure the feasibility of all federal water resource projects including those developed by the Bureau of Indian Affairs.[15] The Master made one isolated comment which might be interpreted to mean that he thought that those benefit-cost analyses were not relevant to this case.[15.1] But his comment could easily be read to indicate his disinclination to pursue an example outside the facts of this case that counsel was carrying too far. And in any event, his findings followed the evidence supported by economics that was offered by the United States.[16]

Given this background I believe that the present approaches of the United States and the State Parties more nearly adhere to the law of this case. The arguments by the Tribes that the definition of practicably irrigable should incorporate various subsidies to Indian Tribes, such that any analysis is a financial analy-

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15. Pr. Tr. 12771-72, 13241, 13247-49. One commentator has reached this conclusion based on his study of the case. Note, *Indian Reserved Water Rights: The* Winters *of Our Discontent*, 88 YALE L.J. 1689, 1696 n.51 (1979). Because the Master's Report is not explicit on this point, such a conclusion can only be made from a study of the entire presentation of the parties, including, the exhibits before the prior Master and the bases upon which those exhibits were prepared. Ranquist, *The* Winters *Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 B.Y.U. L. REV. 639, 660 n.89.

15.1. Pr. Tr. 13269-71.

16. In determining the irrigable acreage on the Reservations, the Master generally relied upon a series of exhibits prepared by the United States experts. *See* SPECIAL MASTER'S REPORT at 267-82. Those exhibits were U.S. Exhs. 1210, 1009, 1121, 570, 1322. *See also* Pr. Calif. Exhs. 3546, 3517. The document, Circular A-47, upon which one United States expert stated the conclusions in the United States' exhibits were based, was introduced by California. *See* Pr. Calif. Exh. 2603; Pr. Tr. 13249.

sis from the point of view of the Indians, are misguided. The past analysis accepted by the former Master and the Court clearly was a non-Indian economic analysis measuring total benefits against total costs for water without regard to the special considerations available to the Tribes.[17] I simply do not believe as do the Quechans that the very few details of the actual calculations introduced in the testimony means that economics were not considered. Rather than reaching the conclusion that no economic analysis was undertaken, I am convinced that the analysis was actually too loose in that no attempt was made to locate the maximum claims by marginal analysis. *See* text

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17. Pr. Tr. 13265-66. *See* Ranquist, *supra* note 15, at 660. Thus, the deferred repayment provisions of the Leavitt Act, 25 U.S.C. 386a (1976), should not be considered to increase the feasibility of the projects on the issue of whether water rights should be decreed. The rejection of the consideration of the Leavitt Act in the prior proceedings makes untenable the Tribes' suggestions. This determination, of course, has no effect on other cases in which the quantification standard used might incorporate general reclamation standards along with such matters as the Leavitt Act in order to give the Indians sufficient water to make a particular reservation livable. *See* Ranquist, *supra* note 15, at 660-61. There have also been theoretical economics arguments along these lines. *See* Burness, Cummings, Gorman & Lansford, *United States Reclamation Policy and Indian Water Rights*, 20 NAT. RESOURCES J. 807, 822-24 (1980).

The later Article has been brought to my attention by the Four Tribes. The authors' theme is that the Leavitt Act deferment provisions should be compared to power revenues generated by reclamation projects in which the power revenues are used as a societal benefit to offset the costs of the project. *Id.* The analogy, however, seems imperfect because the Leavitt Act benefits to Indians are not generated by Indian irrigation projects as power revenues are generated by reclamation projects. Perhaps the Leavitt Act provisions might be viewed as quantifying the intangible benefits accruing to society when the Indians utilize such benefits to provide for themselves in a constructive manner. Because of the prior practice in this case, such concerns are, however, not presently relevant.

supra at pp. 49-50. The claims presented were only those that were obviously economic.

Neither the State Parties nor the United States sought to match perfectly the evidence introduced before the former Special Master. My choice is limited somewhat by the evidence introduced by the parties. On the whole, the approach followed by the United States appears to be the most theoretically pure economic analysis[18] that resembles what was done in the past. The State Parties urge that the appropriate standard is an "objective" one that does not consider the status or situation of the intended project user,[19] but their own expert admitted that his analysis is a combination of an economic and financial analysis.[20] Moreover, only the United States presented testimony of an expert economist who was qualified to offer opinions regarding economic theory and its application. The State Parties most vigorously dispute the United States' application of economic theory in such cases as the choice of the proper interest rate and power cost. My analysis will generally adopt the theory and application presented by the United States. In dealing with particular benefits or cost items, I shall indicate my reasons for adopting a particular figure.

As a final wrinkle, the State Parties have raised the question of the appropriate date from which to measure feasibility. In the extreme example, they have pursued the matter to the extent of investigating the

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18. For a discussion of the economic theory aspects of the reclamation standards such as those used in this case, see generally Burness, Cummings, Gorman & Lansford, *supra* note 17.

19. State Parties' Post-Trial Opening Brief 61 (May 1981).

20. Tr. 5361. Actually, he testified that his analysis "really fits both these categories," an outcome that is highly unlikely, if it is not impossible. *Id.*

limited reservation acreage that might feasibly have been irrigated in the nineteenth century.[21] This opposition has remained throughout the case although it has become a more implicit position that is manifested in the State Parties' adoption of various outdated assumptions which will be discussed later. My reading of the transcript reveals that the evidence of "practicable irrigability" was determined by then-current standards.[22] I am similarly convinced that my determinations of practicable irrigability should be based on present standards. Reference to past standards would introduce an additional complication in an already complex case. Given that these issues are to be litigated presently,[23] the most sensible method of determining feasibility is by using present standards.[24]

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21. *See* S.P. Exh. 26, at VI-1 to -5 (Apr. 1980). Such a part of this report was received as an offer of proof. Tr. 3636, 3643.

22. *See, e.g.*, Pr. Tr. 14120.

23. An advance in technology that enhances the feasibility of irrigation projects would not by itself present a good reason to reopen the Decree for an adjustment of the water decreed to the Tribes.

24. The above discussion indicates that prior practice of using current technology should guide the present decision. Some theoretical concerns might be disposed of, as well. Using technology in existence at the time of quantification may cause the quantity potentially to be fixed to increase with technological advances depending on the date of adjudication. *See* Clyde, *Special Considerations Involving Indian Rights*, 8 NAT. RESOURCES LAW. 237, 246-47 (1975); Price & Weatherford, *Indian Water Rights in Theory and Practice: Navajo Experience in the Colorado River Basin*, 40 LAW & CONTEMP. PROB. 97, 106-07 (1976). Quantification based on technology at the date of establishment of the reservation may provide a fixed quantity, but it also creates the difficulty of determining the technological possibilities of the nineteenth and early twentieth centuries. That inquiry is not likely to be reliable and might consume a large amount of trial time by itself. A "single" "brightline standard applicable to all reserved rights" might be a desirable approach. *See* YALE Note, *supra* note 15, at 1696 n.51. But the "practicably irrigable" standard seems to defy such an approach by definition. The ultimate inquiry is: Practicable by what standards? That question inherently incorporates a

2. Profit Margin

The State Parties claim that their experts believe that "equality of benefits and costs should not constitute irrigability, that there should be a profit margin to compensate for risks inherent in agriculture and for recovery of capital invested in project development."[25] Those experts offer as appropriate the purported policy of the "Federal Government [which allegedly] has traditionally considered that an irrigation project is financially feasible if the annual project costs do not exceed about 75 percent of the estimated payment capacity."[26]

For several reasons, I am not certain that this statement correctly summarizes federal irrigation policy as it relates to this case or is theoretically correct in other particulars.[27] In any event, I believe that the earlier practice established in this case was based upon a comparison of benefits and costs with the conclusion that if benefits at least equal costs the land is irrigable.[28] I need not directly address such a question be-

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reference to technology which always implies a specific date. Such a statement is not really a criticism of the "practicably irrigable" standard. Uniformity of quantification may be a fine theoretical goal, but given that water rights are quantified in separate judicial proceedings, the variation in evidence produced and the vagaries of the fact-finding process will undercut any pretense to uniformity from case to case. The variant proofs in this case should illustrate that point. Moreover, the "practicably irrigable" standard is not necessarily a standard to be used in all cases and when it is used it may not have the exact meaning it holds in this case. The amount reserved in each case is the amount required to make each reservation livable.

25. State Parties' Trial Brief 19 (Aug. 1980).

26. S.P. Exh. 26, at V-1.

27. *See generally* Burness, Cummings, Gorman & Lansford, *United States Reclamation Policy and Indian Water Rights*, 20 NAT. RESOURCES J. 807 (1980).

28. *See* Pr. Tr. 12771-72, 13238-71; Pr. Calif. Exh. 2603.

cause the State Parties' experts did not challenge any United States claims on this basis.[29] Moreover, the course of this litigation has removed the necessity of consideration of the most extreme situations of this nature.[30] For present purposes, a finding that annual benefits exceed costs will suffice for a finding of practicable irrigability.

C. *Gross-to-Net Reduction in Acreage*

The parties in various degrees dispute the proper figure for computing the net acreage that would be farmed after farm roads and farm steads have been constructed. The State Parties initially claimed that this question was *res judicata* and that the same figures used in leading to the 1964 Decree should be applied to the additional gross acres of practicably irrigable land which are the subject of the present proceedings.[31] This motion was denied in the pre-trial stages,[32] and this issue was included among those is-

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29. *See* S.P. Exh. 26, at V-1; State Parties' Trial Brief 19 (Aug. 1980).

30. In U.S. Exh. 60 several irrigation units are represented as having annual benefits exceeding annual costs by no more than two dollars. *Id.* at 18. For those units on the Colorado River Indian Reservation the parties' stipulation makes unnecessary any further consideration of those parcels. With regard to the two parcels of this description on the Fort Mojave Reservation, FM-7 now shows lower annual costs than originally projected and my other findings have eliminated the Quail Hollow Unit claim that was based on the United States' proof.

31. State Parties' Brief Regarding Gross to Net Acreage Reduction Percentages Utilized in the Original Proceeding 3 (June 1980), record item no. 55.

32. *See* Order of August 8, 1980, record item no. 68. The appropriate reduction factor can vary widely. For the larger Reservations these reduction percentages were approximately 8% on Chemehuevi, 10% on Fort Mojave, and 12% on Colorado River. *See* Pr. U.S. Exhs. 1210, 1322, 570. The figure chosen is a matter of judgment based upon such factors as land characteristics and development plans. *See* Pr. Tr. 14857-61.

sues listed for resolution in the pre-trial order.[33]

The basic dispute as presented by the parties' evidence is relatively minor. The United States favored a reduction of 4% on all Reservations except Chemehuevi where it used a 2% figure.[34] Both the Four Tribes and the State Parties used a basic reduction percentage of 5%.[35] The State Parties also added an additional 1% reduction, because some of the lands for which water rights are presently requested are devoted to uses other than farming or services ancillary to farming.[36]

Every expert's opinion is basically competent. Each used his experience to evaluate the appropriate gross-to-net reduction figure.[37] The State Parties and the Tribes agree that 5% is an appropriate basic reduction percentage for land for such items as farm roads and farm ditches which would occupy land that would not require water rights even if the greater parcel were irrigated. This figure is reasonable and I adopt it as the correct basic reduction percentage for the claims on all five Reservations except for those presented only by the Quechan Tribe. That Tribe has presented evidence relating to its claim regarding the Fort Yuma Reservation which indicates reduction figures of 6% and 10% for its claim. I will accept those latter figures only for that claim.

Even the State Parties' expert believed that the use of the earlier reduction percentages was neither reasonable nor appropriate for present purposes concerning the lands under consideration. Tr. 4335-36.

33. *See* Pre-Trial Order, at 3, record item no. 69.

34. U.S. Exh. 42, at 3.

35. F.M. Exh. 2, at 34; C.R. Exh. 1, at 34; CH. Exh. 1, at Table 9 & n.2. *See* Tr. 3687. *See also* S.P. Exh. 26, at II-11.

36. *See* Tr. 3687-88, 4336. *See also* S.P. Exh. 26, at II-11.

37. *See* 521-23, 1126-27, 3687-88.

The State Parties claim that an additional 1% should be added to this basic figure. This addition would account for "permanent developments" on the concerned lands.[38] They note that no other experts attempted to account for these "permanent developments."[39] The other experts were correct. The Tribes under the earlier *Special Master's Report*[40] and the 1979 Supplemental Decree[41] are not limited in the use of decreed water rights to agricultural purposes. The quantity of water is determined by the number of practicably irrigable acres on the Reservations. The actual use of the lands for other purposes is irrelevant. The State Parties failed to understand the point.[42] I, thus, find that the basic reduction factor need not be increased by the 1% figure.

The State Parties also raise one other point meriting discussion. They note that the United States' evidence in the earlier proceeding allowed for diversions for such nonagricultural uses as "domestic and stock watering purposes."[43] Such uses were allocated an additional amount equal to 1% of the "agricultural con-

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38. Tr. 4336.

39. State Parties' Post-Trial Opening Brief 222 (May 1981).

40. Special Masters Report at 265.

41. 439 U.S. at 422-23.

42. This confusion is apparent in the testimony of the State Parties' expert. His initial answers implied that this land was excluded from water rights consideration because it would not be farmed. Tr. 4336. Later he stated that: "The fact that the development exists leads us to conclude that it does have a water supply and that additional water supplies for that particular piece of ground are not required. That is why we used the one percent." Tr. 4399. This reasoning makes no sense if as that expert acknowledged the lands under consideration do not presently have water *rights*. *See* Tr. 4399-4400.

43. State Parties' Post-Trial Opening Brief 223 (May 1981). *See* Pr. Tr. 14863-65.

sumptive use."[44] From that fact the State Parties conclude that 1% was subtracted from the reduction percentage in the earlier case. This conclusion is erroneous. The 1% nonagricultural use factor does not have an additive relationship to the gross-to-net acreage reduction factor.[45] The factor instead is subsumed in the unit diversion rate applicable to the individual Reservations.[46] For present purposes, no attention need be directed to this 1% figure.

The gross practicably irrigable acreage should be reduced to appropriate net acreage figures by a simple reduction of 5% except for those lands claimed only by the Quechan Tribe for which a different figure discussed below is used.

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44. *See* Pr. Tr. 14863.

45. For example, if the State Parties' methods were used on the Colorado River Indian Reservation figures introduced in the prior proceeding a different diversion requirement than that originally projected by the United States would be reached. *See* Pr. U.S. Exhs. 561, 563, 570; Pr. Tr. 14857-66. That total diversion amount was not accepted by the prior Master because he found less irrigable acreage to be within that Reservation's boundaries. *See* SPECIAL MASTER'S REPORT at 272.

In order to closely follow the prior analysis, I should ignore this 1% decrease in the reduction percentage. The unit diversion quantity in acre-feet per irrigable acre is 6.67 on this Reservation.

$\left(\frac{734{,}886 \text{ AF}}{110{,}244 \text{ acres}} = 6.665995\right)$. *See* 439 U.S. at 422; Pr. U.S. Exh. 570.

The diversion rate would be 6.6 if the nonagricultural consumptive use were not counted ($363{,}806 \times 2 = 727{,}612$; $\frac{727{,}612}{110{,}244} = 6.60001$).

Thus, the nonagricultural consumptive use is incorporated into the 6.67 diversion rate figure, and no further adjustment need be made.

46. *See* 439 U.S. at 422.

IV. Priority Dates for Additional Water Rights

The question concerning a water right's priority date is vital since in times of shortage a junior right may lose out to a senior right. The purpose of the 1979 Decree, 439 U.S. 419 (1979), was to set the priority dates for various present perfected water rights along the Colorado River. The issue of priority dates for additional water rights to be awarded[1] was included in the pre-trial order as an issue to be determined. This issue may be of some lingering theoretical significance but for all practical purposes it appears controlled by the language of the 1979 Decree which states that the Secretary of the Interior in the event of shortage should, except for the satisfaction of miscellaneous present perfected rights, "first provide for the satisfaction in full of all rights of [the five Tribes] as set forth in Art. II(D)(1)-(5) of [the 1964] Decree." 439 U.S. at 421. The 1979 Decree then further provides that the quantities specified in Art. II(D)(1)-(5) were "subject to the appropriate adjustment" by decree "in the event that the boundaries of the respective reservations are finally determined." *Id.* Upon amendment of the Decree, all water rights successfully asserted with respect to land designated as boundary land[2] in this

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1. The United States observes, correctly I believe, that the pre-trial order's reference to land "added to the reservation" is somewhat misleading because the land designated as boundary land generally belonged to the Reservations before 1964 but only recently was such land recognized as part of the Reservations. *See* United States' Pre-Trial Brief 19 (Aug. 1980).

2. This would include the 1974 addition to the Cocopah Reservation. 88 Stat. 266. *See also* 376 U.S. at 344 (United States may make further reservations of Colorado River waters). Of course this statement implies what I believe to be indisputable: the Congress intended to reserve water rights for this land when setting it aside for the Cocopah Indian Tribe.

case should, thus, take the priority specified in that Decree. The water rights successfully asserted with respect to boundary lands as well as omitted lands should logically be eligible for a possibly earlier priority dating from the time when such land was made a part of the Reservation.[3] But the importance of such an earlier priority seems small in light of the 1979 Decree.[4]

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3. The prior Master did not have sufficient evidence regarding the priority dates on the Colorado River and Fort Mojave Reservations to make a specific finding on the subject. *See* SPECIAL MASTER'S REPORT at 274 n.33, 283 n.57. Those dates were specified with respect to specific acres in the 1978 Decree. *See* 439 U.S. at 423-36. With respect to the omitted lands, I am unaware of any such evidence which might be used for these present purposes.

4. Certainly the State Parties could not fairly challenge such a description of the priority, given that in a 1979 oral argument regarding the then-proposed supplemental decree, they represented to the Court that under the later-adopted Decree:

1) any additional water rights with respect to boundary lands would be prior to all major non-federal present perfected rights; and
2) any additional rights from omitted lands, regardless of the subordination agreement, could have an earlier priority date tied to the original priority dates for the respective reservations.

Transcript of Oral Argument in Supreme Court, *Arizona v. California* 7, 9 (Oct. 10, 1979).

V. Requested Water Rights

The water rights requested may be conveniently expressed in tabular form. The requested water rights are expressed first in terms of the acreage which the claimant believes to be practicably irrigable. Upon such a finding the water rights may then be expressed in terms of a diversion right for each Reservation by calculating the total from the acre-feet of water to be received for each irrigable acre. *See* 439 U.S. at 422. Because the location of the acreage and its character as either boundary or omitted land are important issues in this case, I will attempt to make such specifications as the evidence permits.

The United States claims that the following acreage is practicably irrigable:

United States Claims in Gross Acres

Reservation	Fort Mojave	Chemhuevi	Cocopah	Colorado River	Fort Yuma
California					
Omitted	323	1,415	0	1,853.5	216
Boundary	1,956	0	0	3,600	4,217
	2,279	1,415	0	5,453.5	4,433
Arizona					
Omitted	2,885	0	81	16,180.5	0
Boundary	1,244	0	1,161	0	1,517
	4,129	0	1,242	16,180.5	1,517
Nevada					
Omitted	182	0	0	0	0
Boundary	0	0	0	0	0
	182	0	0	0	0

Reservation	Fort Mojave	Chemehuevi	Cocopah	Colorado River	Fort Yuma
Total					
Omitted	3,390	1,415	81	18,034	216
Boundary	3,200	0	1,161	3,600	5,734
	6,590[1]	1,415[2]	1,242[3]	21,634[4]	5,950[5]

1. U.S. Exh. 42, Table 7; S.P. Exh. 110; Table B-1; United States' Post-Trial Opening Brief 52-54 (May 1981); State Parties' Post-Trial Closing Brief 13 (June 1981).

2. U.S. Exh. 42, Table 9; S.P. Exh. 110, Table B-3; United States' Post-Trial Opening Brief 52-54 (May 1981).

3. U.S. Exh. 42, Table 9; S.P. Exh. 110, Table B-4; United States' Post-Trial Opening Brief 52-54 (May 1981); State Parties' Post-Trial Closing Brief 13 (June 1981).

4. Stipulation of September 8, 1980, record item no. 91; United States' Post-Trial Opening Brief 52-53 (May 1981); State Parties' Post-Trial Closing Brief 13 (June 1981). The United States expert report, U.S. Exh. 42, originally asserted that Units CR-4 and CR-16 contained both omitted and boundary lands without separately identifying the small amount of boundary lands. *See* U.S. Exh. 42, Table 8 nn. *. The State Parties separately identified 104 acres of boundary lands on CR-4 and 24 such acres on CR-16. *See* S.P. Exh. 110, Table B-2. The United States has subsequently stated that the figures used by the State Parties are correct. *See* Letter from Scott McElroy (Sept. 28, 1981), record item no. 188. Noting in that letter that this matter was covered in the Stipulation, the United States further notes that under that agreement the Tribe may assert claims outside the parcels delineated in U.S. Exh. 42.

5. *See* State Parties' Post-Trial Closing Brief 13 (June 1981). *See also* U.S. Exh. 42, Table 10; United States' Post-Trial Opening Brief 53 (May 1981); S.P. Exh. 110, Table B-5. The State Parties noted in their reply brief certain errors in the United States' statement of claims as they appear in the United States brief and U.S. Exh. 42, Table 10. The United States agreed with the corrections then noted. *See* Letter from Scott McElroy (Sept. 28, 1981), record item no. 188. The corrections changed the claims made in U.S. Exh. 42 for four units as follows:

Unit	Original Claim (gross acres)	Present Claim (gross acres)
FY-4 Cal. Omitted	160	216
Cal. Boundary	606	550
FY-7 Cal. Boundary	335	807
Ariz. Boundary	807	335

The State Parties' response creates an issue of fact. They admit that significant amounts of the acreage claimed by the United States are practicably irrigable. In fact, with respect to the Colorado River Indian Reservation, all interested parties have stipulated as to the irrigability of part of the acreage claimed only by the United States.[6] The State Parties, however, dispute the remaining claims of the United States. The State Parties admit that the following acreage is practicably irrigable:

State Parties' Response to United States Claims in Gross Irrigable Acres

Reservation	Fort Mojave	Chemehuevi	Cocopah	Colorado River	Fort Yuma
California					
Omitted	15	42	0	1,853.5	83
Boundary	1,861	0	0	3,600	4,008
	1,876	42	0	5,453.5	4,091
Arizona					
Omitted	353	0	58	16,180.5	0
Boundary	1,220	0	1,119	0	1,063
	1,573	0	1,177	16,180.5	1,063

FY-8	Cal. Boundary	631	28
	Ariz. Boundary	28	631
FY-9	Cal. Boundary	551	649
	Ariz. Boundary	649	551

The United States claims, thus, conform in these respects to the outline of United States claims in S.P. Exh. 110, Table B-5. The United States claim regarding Unit FY-10 also differs from the description in S.P. Exh. 110, because the United States describes the entire parcel as boundary land while the State Parties originally divided it between boundary and omitted land. *Compare* U.S. Exh. 42, Table 10; S.P. Exh. 110, Table B-5. The State Parties, however, have acknowledged that the United States' description of this parcel is correct. *See* Letter from Douglas Noble (Sept. 23, 1981), record item no. 187.

6. *See* Stipulation of September 8, 1980, record item no. 91.

Nevada					
Omitted	2	0	0	0	0
Boundary	0	0	0	0	0
	2	0	0	0	0
Total					
Omitted	370	42	58	18,034	83
Boundary	3,081	0	1,119	3,600	5,071
	3,451[7]	42[8]	1,177[9]	21,634[10]	5,154[11]

Four of the five Indian Tribes have asserted claims on their own behalf. These Tribes have also generally adopted the claims made by the United States. In addition, they have asserted claims which supplement those of the United States. The Tribes claim that the following additional acreage is practicably irrigable:

Water Rights Requested Only by the Tribes in Gross Acres

Reservation	Fort Mojave	Chemehuevi	Colorado River	Fort Yuma
California				
Omitted	97	1,770	0	0
Boundary	0	0	0	10,982
	97	1,770	0	10,982
Arizona				
Omitted	867	0	8,662	0
Boundary	208	0	0	218
	1,075	0	8,662	218
Nevada				
Omitted	567	0	0	0
Boundary	0	0	0	0
	567	0	0	0

7. S.P. Exh. 110, Table B-1.
8. *Id* at Table B-3.
9. *Id.* at Table B-4.
10. Stipulation of September 8, 1980, record item no. 91.
11. S.P. Exh. 110, Table B-5.

Reservation	Fort Mojave	Chemehuevi	Colorado River	Fort Yuma
Total				
Omitted	1,531	1,770	8,662	0
Boundary	208	0	0	11,200
	1,739[12]	1,770[13]	8,662[14]	11,200[15]

The State Parties view these claims as being much less meritorious than the claims made by the United States. They admit that the following acres are practicably irrigable:

State Parties' Response to the Tribes' Claims in Gross Acres

Reservation	Fort Mojave	Chemehuevi	Colorado River	Fort Yuma
California				
Omitted	0	0	0	0

12. F.M. Supp. Exh. (Sept. 1981), record item no. 192; Letter from Thomas Fredericks (Nov. 10, 1981), record item no. 202. One parcel, FM-130, had been reduced in size from the time when the original report was written and parcel FM-201 was eliminated. *See* F.M. Exh. 2, Map No. 1. These changes and others were apparently made to conform to changes in the United States claims. *See* C.R. Exh. 50.

13. CH. Supp. Exh. (Sept. 1981), record item no. 190.

14. The Tribe claimed on Unit CR-6 a number of acres beyond those claimed by the United States for that parcel to be irrigable. I understand this acreage is subject to the stipulation of September 8, 1980. *See* C.R. Exh. 1, Table 7; C.R. Exh. 2; Four Tribes' Post-Trial Opening Brief 92 (May 1981).

15. F.Y. Exh. 18, at 56-58; F.Y. Exhs. 19, 30; F.Y. Supp. Exh. (Nov. 1981), record item no. 199; Letter with attachments from Raymond Simpson (Nov. 5, 1981), record item no. 199. The sum of the acres claimed on the F.Y. Supp. Exh. does not equal the total given in that exhibit. The total adopted here was derived from an independent calculation on the separate amounts claimed in F.Y. Supp. Exh. for each individual parcel. The Tribe did claim 191 acres less than the United States' claim for Unit FY-4. To the extent that the United States is successful in this assertion, I will ignore the fact that the Tribe has not claimed the 191 additional acres.

Reservation	Fort Mojave	Chemehuevi	Colorado River	Fort Yuma
Boundary	0	0	0	183
	0	0	0	183
Arizona				
Omitted	108	0	0	0
Boundary	111	0	0	0
	219	0	0	0
Nevada				
Omitted	0	0	0	0
Boundary	0	0	0	0
	0	0	0	0
Total				
Omitted	108	0	0	0
Boundary	111	0	0	183
	219[16]	0[17]	0[18]	183[19]

16. S.P. Exh. 147; F.M. Supp. Exh. (Sept. 1981), record item no. 192; Letter from Ralph Hunsaker (Nov. 17, 1981), record item no. 203.

17. S.P. Exh. 149; CH. Supp. Exh. (Sept. 1981), record item no. 190.

18. S.P. Exh. 148; C.R. Exh. 1, Table 7, C.R. Exh. 2; Four Tribes' Post-Trial Opening Brief 92 (May 1981).

19. S.P. Exh. 151; S.P. Exh. 110, Table B-5; F.Y. Exh. 18, at 56-58; F.Y. Exh. 19; F.Y. Exh. 30; F.Y. Supp. Exh. (Nov. 1981), record item no. 199; Letter with attachments from Raymond Simpson (Nov. 5, 1981), record item no. 199. The Tribe claims acreage designated by United States parcel number but adds more acreage to these parcels. *Id.* As a result, the State Parties reply in S.P. Exh. 151 notes additional irrigable acreage for two such parcels, Units FY-3 and FY-12, when compared to S.P. Exh. 110, Table B-5.

VI. Findings of Fact and Conclusions of Law Relating to the Irrigability of Disputed Lands

The views of the United States,[1] the Tribes,[2] and the State Parties[3] are, to varying extents, each supported by competent expert opinion evidence. Under these circumstances the findings in this case might be set forth simply as summary factual findings without explanation. That summary is contained in this section. The extensive and painstaking work of all counsel, however, justifies a more complete explanation of those findings, which is contained in Part Two of this Report.

In general I have found the evidence of the United States and the Tribes to be more persuasive at various significant points. On the other hand, regarding a substantial number of points, I have found the State Parties position to be more convincing, particularly with respect to the lands claimed solely by the Tribes to be practicably irrigable. The process of choosing between opposing opinions, I believe, has resulted in a deep appreciation of the close scrutiny which the experts have given to the merits of this case. In the words of one of the Tribes' experts:

> I do not know of any agricultural analysis that has gone into in the depth and in detail that the investigation of these lands on the Colorado River area has gone through. . . . We have gone to great depths to determine that this land is indeed suitable for the growing of these crops. We have gone to extreme lengths to determine

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1. U.S. Exhs. 1-18, 42, 60.
2. C.R. Exhs. 1, 2, 50; CH. Exhs. 1, 2; F.M. Exh. 2; F.Y. Exhs. 18, 19, 30, 57, 58a.
3. S.P. Exhs. 26, 110, 158A-MM.

the feasibility, the economic feasibility of growing these crops.[4]

Under such careful opposing analysis only serious and potentially meritorious contentions could survive unretracted. The parties' competing arguments, thus, merit careful attention which is forthcoming in Part Two of this Report. To conclude this Part of the Report those findings should now be set out in summary form.

United States Claims
Findings of Fact

1. Competent evidence of practicable irrigability of Reservation lands supports the claims of the United States.[5] The State Parties' responses also are competent and partially support their position in the disputes with the United States.[6] The evidence supporting the claimant, the United States, is more persuasive with respect to the most significant issues of practicable irrigability of Reservation land with such exceptions as noted below.

2. Within the irrigation units designated in the United States claims, there are a number of acres classified in soils classification studies as non-irrigable. Such acres are not practicably irrigable:

Reservation	Nonirrigable Gross Acres
Cocopah	10
Ft. Yuma	84

4. Tr. 6501-02.
5. U.S. Exhs. 1-14, 16-18, 42, 60
6. S.P. Exhs. 26, 110, 158A-MM.

Chemehuevi	329
Ft. Mojave	776[7]

3. Within the irrigation units designated in the United States claims as practicably irrigable acreage on the Fort Mojave Indian Reservation, there are a number of acres for which there has not been a sufficient showing that they are presently within the Reservation boundaries:[8]

Description	Gross Acres
California omitted land	200
Arizona omitted land	118
Arizona boundary land	757
Total	1,075[9]

7. *See* U.S. Exhs. 3, 6, 14, 17. *See also* U.S. Exh. 1, at 51, 54, 57, 65, 69. The entire non-irrigable acreage on the Cocopah Reservation is Arizona omitted land and on the Chemehuevi Reservation the entire amount of such land is California omitted land. For the Fort Yuma and Fort Mojave Reservations, such specifications were not initially made by the United States' soils expert whose testimony I found to be persuasive on the merits of the soils classification. Upon my request, the United States supplied this information but due to a delay in its response the information did not arrive until after this Report had gone to the press. Should this information be required it is in the record. Letter from Scott McElroy (Jan. 5, 1982), record item no. 206. Without explanation, the total of the figures now specified by the United States does not match the figures previously used in this case. To use these new figures now would allow the United States to change its claims at an extremely late stage. Despite the probable perception of the United States that this does not change its claim, given that it has always claimed these non-irrigable lands, I will not permit this late amendment. For my purposes, the specification is not essential, although the Court's holding may yet require it.

8. Actually there is involved in this matter a boundary dispute similar to that which occurred in the earlier proceedings.

9. S.P. Exh. 160. *See also* Tr. 5297; U.S. Exh. 42, Table 7 and map of Fort Mojave Reservation; S.P. Exh. 159.

4. There are 218 fewer net acres on the Colorado River Indian Reservation than were found within the Reservation by the Court in the earlier proceedings.[10]

5. The United States claim for California boundary land in the amount of 95 gross acres within the Quail Hollow Unit on the Fort Mojave Reservation is not persuasive on the evidence presented by the claimant.[11]

6. The gross irrigable acreage on each Reservation should be converted to a net figure for computation of diversion rights based on a reduction of 5%.[12]

7. The following practicably irrigable acres presently without water rights lie on the Reservations:

Reservation	Gross Acreage	Net Acreage
Ft. Mojave	4,644[13] x .95	= 4,412
Chemehuevi	1,086[14] x .95	= 1,032
Cocopah	1,232[15] x .95	= 1,170

10. S.P. Exh. 161.

11. *See* U.S. Exh. 42, Tables 7, B-8.

12. *See* S.P. Exh. 26; U.S. Exh. 42; C.R. Exh. 1; F.M. Exh. 2; CH. Exh. 1.

13.

Claimed Acreage	6,590
— Nonirrigable	776
— Calada Unit	95
— Boundary dispute	1,075
Gross Acreage	4,644

14.

Claimed Acreage	1,415
— Nonirrigable	329
Gross Acreage	1,086

15.

Claimed Acreage	1,242
— Nonirrigable	10
	1,232

Colorado River	21,634[16] x .95	-218[17]	= 20,334
Ft. Yuma	5,866[18] x .95		= 5,573

Conclusions of Law

1. For the benefit of the following Reservations the United States has the right to the annual diversion of the following respective additional amounts of water from the Colorado River or to the quantity of mainstream water necessary to supply the consumptive use required for the irrigation of the following net irrigable acres and for the satisfaction of related uses, whichever is less:

Reservation	Unit Diversion Quantity A.F./Ac.[19]		Net Irrigable Acreage	Diversion Amounts in Acre-Feet
Ft. Mojave	6.46	x	4,412	= 28,502
Chemehuevi	5.97	x	1,032	= 6,161
Cocopah	6.37	x	1,170	= 7,453
Colorado River	6.67	x	20,334	= 135,628
Ft. Yuma	6.67	x	5,573	= 37,172

2. The additional water rights granted possess priority dates identical to the dates when the land to which the rights are appurtenant became a part of the Reservation. The priority dates for all Reservations are generally given in the 1964 Decree.[20] The irrigable acres within the area of 360 acres added to the

16. Stipulation of September 8, 1980, record item no. 91.

17. Correction from S.P. Exh. 161.

18. Claimed Acreage 5,950
— Nonirrigable 84
5,866

19. Diversion amounts are fixed by the 1979 Decree. 439 U.S. at 422.

20. The evidence does not permit the specific assignment of dates to parcels of land and accompanying water rights on the Fort Mojave and

Cocopah Indian Reservation by the direction of Congress have a priority date of June 24, 1974.[21] In addition, all water rights appurtenant to land designated as boundary land in this proceeding have a first priority to satisfaction in the event of a shortage of water except for the earlier priority of satisfaction that may lie with miscellaneous present perfected rights with earlier priority dates held by non-Indians.

The Tribes Claims
Findings of Fact

1. Competent evidence of practicable irrigability of Reservation lands substantially supports the claims of the several Tribes.[22] The State Parties' responses also are competent and partially support their position in the dispute with the Tribes.[23] The evidence supporting the claimants, the Tribes, is more persuasive with respect to the most significant issues of practicable irrigability of Reservation land, with such exceptions as noted below.

2. Within the irrigation units designated in the Tribes claims there are a number of acres that are non-irrigable. Such areas are not practicably irrigable:

Colorado River Indian Reservations where sections were reserved at more than a single instance.

21. 88 Stat. 266. (1974).

22. C.R. Exhs. 1, 2; F.M. Exh. 2; CH. Exhs. 1, 2; C.R. Exh. 50; F.Y. Exhs. 18, 19, 30, 57, 58a.

23. S.P. Exhs. 26, 110, 147-52, 158.

Reservation	Land Type	Nonirrigable Gross Acres
Colorado River	Arizona Omitted	861[24]
Chemehuevi	California Omitted	1,150[25]
Ft. Mojave	California Omitted	55
	Arizona Boundary	76
	Arizona Omitted	435
	Total	566[26]
Ft. Yuma	Arizona Boundary	218
	California Boundary	3,970
	Total	4,188[27]

24. S.P. Exh. 148; See Part Two at II.B.(3) *infra*.

25. S.P. Exh. 149; see Part Two at II.B.(4).

26. S.P. Exh. 147; see Part Two at II.B.(2) *infra*.

27. S.P. Exh. 151; S.P. Exh. 110; F.Y. Exh. 18, at 56-58; F.Y. Supp. Exh. (Nov. 1981), record item no. 199; see Part Two at II.B.(1) *infra*. For Units FY-9 and FY-10A the increase in non-arable land shown on S.P. Exh. 151 over that shown on S.P. Exh. 110 gives the amounts 76 and 142 gross acres (218 total acres) of Arizona boundary land respectively within these units. The other land is California boundary land. The totals for Units FY-3 and FY-12 are 38 and 80 acres respectively. For the lands north of the Canal there are 3,852 gross non-irrigable acres. These last three figures total 3,970 acres. *See* S.P. Exh. 151. These totals appear in text.

3. There are 129 fewer gross acres of California boundary land in the Fort Yuma irrigation units than estimated by the Tribe.[28]

4. The evidence presented by the Fort Mojave Indian Tribe proves that the 95 gross acres that constitute the Quail Hollow Unit are practicably irrigable.[29]

5. The gross irrigable acreage on each Reservation should be converted to a net figure for computation of diversion rights based on a reduction of 5%,[30] except on the Fort Yuma Indian Reservation where the reduction should be 6% for lands south of the All American Canal and 10% for lands north of the Canal.[31]

6. The following practicably irrigable acres presently without water rights, in addition to those claimed by the United States, lie on the Reservations:

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28. For Unit FY-12 the Tribe claims 284 gross acres. F.Y. Exh. 18 at 56. The State Parties claim that there are 273 gross acres in that unit. S.P. Exh. 151. The difference, 11 acres, constitutes the amount within the total in text for that unit. The Tribe claimed 10,755 irrigable acres in the area north of the Canal. The State Parties' estimate that there are 10,637 acres in this unit. The difference of 118 gross acres is included in the textual total.

29. *See* F.M. Exh. 2; Part Two at I.C.(1)(a) *infra*.

30. C.R. Exh. 1; F.M. Exh. 2; CH. Exh. 1.

31. F.Y. Exh. 18, at 59.

Reservation	Gross Acreage x Reduction Factor	Net Acreage
Ft. Mojave	1,268[32] x .95	= 1,204
Chemehuevi	620[33] x .95	= 589
Colorado River	7,801[34] x .95	= 7,411
Ft. Yuma	98 x .94	= 92
	6,785[35] x .90	= 6,107
	Ft. Yuma total	= 6,199

Conclusions of Law

1. For the benefit of the following Reservations the United States has the right to the annual diversion of the following respective additional amounts of water from the Colorado River or to the quantity of mainstream water necessary to supply the consumptive use required for the irrigation of the following net irrigable

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32. Claimed Acreage	1,739
+ Calada	95
— Nonirrigable	566
Gross Irrigable	1,268
33. Claimed Acreage	1,770
— Nonirrigable	1,150
Gross Irrigable	620
34. Claimed Acreage	8,662
— Nonirrigable	861
Gross Irrigable	7,801
35. *See* note 42 *supra.*	
North of Canal-claimed	10,637
— Nonirrigable	3,852
Gross Irrigable	6,785
South of Canal-claimed	434
— Nonirrigable	
Arizona	218
California	118
Gross Irrigable	98

acres and for the satisfaction of related uses, whichever is less:

Reservation	Unit Diversion Quantity A.F./Ac.[36]		Net Irrigable Acreage	Diversion Amounts in Acre-Feet
Ft. Mojave	6.46	x	1,204	= 7,778
Chemehuevi	5.97	x	589	= 3,516
Colorado River	6.67	x	7,411	= 49,431
Ft. Yuma	6.67	x	6,199	= 41,347

2. The additional water rights granted possess priority dates identical to the dates when the land to which the rights are appurtenant became a part of the Reservation. The priority dates for all Reservations are given in the 1964 Decree.[37] In addition, all water rights appurtenant to land designated as boundary land in this proceeding have a first priority to satisfaction in the event of a shortage of water, except for the earlier priority of satisfaction that may lie with miscellaneous present perfected rights with earlier priority dates held by non-Indians.

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36. Diversion amounts are fixed by 1979 Decree. 439 U.S. at 422.

37. The evidence does not permit the specific assignment of dates to parcels of land and accompanying water rights on the Fort Mojave and Colorado River Indian Reservations where sections were reserved at more than a single instance.

PART TWO

All five Indian Reservations—Colorado River, Fort Mojave, Fort Yuma, Chemehuevi, and Cocopah—contain land for which additional water rights are now requested. The United States has presented claims for these five Reservations. The Tribes adopted the claims of the United States and, except for the Cocopah Indian Tribe, claimed additional water rights based on their own expert reports. The tribal claims are considerably different from those presented by the United States. My discussion of those tribal claims must, therefore, be distinct from an evaluation of the United States presentation.

I. Claims Presented by the United States

A. *Introduction*

The claims of the United States meet with general agreement from the State Parties. In fact, the State Parties concede that approximately 80% of the acreage claimed by the United States is "practicably irrigable."[1] Of the disputed acreage claimed by the United States on the Colorado River Indian Reservation, the State Parties stipulated to a settlement which split the difference between the two parties.[2] Of the disputed acreage on the other four Reservations, the State Parties candidly admit that it is "land clearly subject to reasonable dispute."[3]

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1. State Parties' Post-Trial Opening Brief 1 (May 1981).
2. *See* Stipulation, September 8, 1980. This stipulation holds 21,634 acres on the Reservation to be practicably irrigable.
3. State Parties' Post-Trial Opening Brief 1 (May 1981).

This statement by the State Parties almost constitutes an admission that a finding sustaining all the United States factual claims would not be erroneous even if the State Parties dispute these claims. I agree with that characterization of this dispute. But I believe that the United States' evidence is generally stronger. After considering the competing presentations I find the United States' evidence to be the more convincing and, with noted exceptions, sustain its claims.

My resolution of this dispute does not merit a detailed discussion of the complete methodology employed by each side in demonstrating that crops can or cannot be grown profitably on these lands. Rather this matter can be adequately treated by briefly outlining the main areas of contention such as the effect of or proper accounting for: sandy soils; gravelly-cobbly soils; inclusion of non-arable land in irrigation units; gross-to-net acreage reduction; and costs. My discussion will be limited to those points of contention as noted in the State Parties' briefs.

B. *Sandy Lands*

The State Parties contend that approximately 1750 gross acres claimed by the United States are non-arable, lacking an ability to produce profitably any crops, because of their sandy nature.[4] These acres are primarily located on the Fort Mojave Reservation (irrigation units labelled by the parties as FM-2, FM-6, FM-7)

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4. State Parties' Post-Trial Opening Brief 11 (May 1981); S.P. Exh. 110, Tables B-1, B-3, B-4, B-5. This figure excludes the 176 gross acres found non-arable for this reason on the Colorado River Indian Reservation. *See id.* at Table B-2. The stipulation regarding that Reservation removed those acres from controversy. Similarly the total of 1922 gross acres for all Reservations in Table B-6 must stand corrected as well.

and on the Fort Yuma Reservation (Unit FY-8).[5] The State Parties find this land non-arable primarily based on the investigation by their soils expert.[6] They claim that this expert's analysis was confirmed by payment capacity analysis using predicted yields and costs adjusted for sandy lands.[7]

1. *Low Moisture-Holding Capacity*

The State Parties' initial and most forceful objection regarding these sandy soils relates to the moisture-holding capacity of the soils. Their soils expert's finding of non-arability was based upon his own field work[8] and laboratory tests. The most crucial test for my findings is the moisture-holding capacity analysis which indicated lower moisture retention levels than considered acceptable by the State Parties' experts.[9]

This conclusion by the State Parties' soils expert was primarily determined by rather venerable standards for moisture-holding capacity developed over thirty years ago by another of the State Parties' experts, who testified primarily with respect to sandy lands and has undoubtedly achieved a good deal of professional recognition for his work in this field.[10] The test was designed to determine what is called "plant available moisture." This amount is determined by first identifying the soils' "field capacity" which is the amount of water remaining in a saturated soil profile after losses to gravity. This natural process is sim-

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5. S.P. Exh. 110; Tr. 3699.
6. *See* Tr. 3063-91, 3102-12.
7. Tr. 3699-711; S.P. Exhs. 113, 114, 115.
8. *See generally* Tr. 3107-10, 3463-64; S.P. Exh. 27.
9. *See* Tr. 3102-03; S.P. Exh. 22.
10. *See* Tr. 2344-75, 3111; S.P. Exhs. 14, 15, 16.

ulated by an applied pressure test of 0.1 atmosphere (one-tenth bar). The plants generally begin to wilt when 50% of the water at field capacity remains. The difference in terms of water between "field capacity" and "wilting point" is "plant available moisture." This concept represented the amount of water held in the soils for effective use by the plants and was measured in terms of inches per the top four feet of soii. The experiments long ago designed by the State Parties' expert determined that approximately 2.5 inches of plant available moisture was necessary before soil could be considered arable.[11] The major disputed parcels of sandy soils following laboratory tests all failed to qualify as arable by this standard.[12]

Although this test has long been used by the Bureau of Reclamation, now the Water and Power Resources Service (WPRS), I do not consider it to be the best current test for determining acceptable levels of moisture retention in all soils. The State Parties and their expert claim that WPRS still uses this test in the lower Colorado River Valley.[13] An abundance of other evidence convinces me that the standard proposed by the State Parties is both outdated and in any event is not an absolute requirement of arability of soils. As early as 1952, the Bureau of Reclamation recommended farming sandy lands with as little as 1.9 inches of plant available moisture per four foot soil pro-

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11. Tr. 2387, 2484; *see* S.P. Exh. 26, at II-6 (the general guideline is a range between 2.3 and 2.6 inches).

12. Tr. 2368-71, 2373-76, S.P. Exh. 22. The four units failed in varying degrees. On FM-2 three samples revealed plant available moisture of .885 to 1.128 inches in a four foot profile. Samples from FM-6 and FM-7 were similar. Of the samples from FY-8 the highest score was 2.492 inches. S.P. Exh. 22.

13. Tr. 2385-90.

file.[14] The method of using 50% of field capacity has apparently been replaced by the Bureau of Reclamation[15] with a test which measures the plant available water as the difference between the water retained at .1 Bar and 15 Bars atmospheric pressure. Other scientists have also concluded that the test proposed by the State Parties significantly understates the amount of water available to plants on sandy soils.[16] In addition, the test used by the State Parties seems inevitably linked to the feasibility of older types of irrigation systems such as flood or gravity systems.[17] In deciding what is presently feasible, current systems must be considered,[18] and the efficiency of such systems have so changed that the feasibility criteria have changed and water holding capacity has thus become relatively "unimportant."[19] The State Parties' experts should therefore be concerned with the cost[20] of such modern systems. The final blow to the State Parties' standard comes from the successful agricultural development, primarily on the Von Santau Ranch, that presently exists on lands once classified as non-arable by the State

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14. *See* U.S. Exh. 89, Report on Ft. Mojave Project, Nevada 28-29 (Oct. 1952). Such lands were by then successfully farmed on the Colorado River Indian Reservation as well. *Id.*

15. U.S. Exh. 90, at ¶¶ 517.6.2D, 517.6.3, 517.6.3D, figure 17. Rather than 50% of field capacity, roughly 60% of the field capacity is believed available for plants. *Id.* ¶ 517.6.2C.

16. *See* U.S. Exh. 126, E. Rivers & R. Shipp, *Available Water Capacity of Sandy and Gravelly North Dakota Soils*, 113 SOIL SCIENCE 74, 78 (1972).

17. *See* Tr. 2498. *See also* U.S. Exh. 76.

18. Peters Deposition at 42, 52, 58-61.

19. U.S. Exh. 124, S.L. Rawlins, *Principles of Managing High Frequency Irrigation*, 37 SOIL SCI. SOC. AMER. PROC. 626, 628 (1973).

20. Tr. 2518-20.

Parties' expert on sandy lands.[21] This test is not necessarily rendered useless by this conclusion, but it definitely represents a criterion which I consider unduly restrictive for the present inquiry.

The United States proposes to evaluate these lands in a different manner. At one time the United States' soils expert had classified much of these lands as non-irrigable or non-arable due to their sandy character. Because certain sandy lands were being farmed primarily on the Fort Mojave Reservation, the United States' expert re-evaluated his standards regarding sandy soils.[22] The soils expert for the United States classified the sandy soils as Rositas sand[23] which is considered irrigable or arable. This determination was made under the standards of the Soil Conservation Service (SCS),[24] which stated in its standards that:

> Rositas soils are used principally for growing citrus fruits, grapes, alfalfa and truck crops.[25]

Indeed, SCS considers all Rositas soils to be "irrigable" or suitable for some crops without considering economics.[26] For the purposes of this litigation, such a characterization does not guarantee a finding of practicable irrigability. As the United States poses the question: "The main concern in using sandy land for growing crops is the low available moisture holding

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21. *See* Tr. 785-99; 1611-21, 1633-36, 2499-510, 5621-48; F.Y. Exh. 72; U.S. Exhs. 77-88, 115, 121, 122.

22. Tr. 160-61.

23. Tr. 165; U.S. Exh. 1, app. A; *see also* Tr. 166-69. The actual term used by this witness to describe this soil was "irrigable" which meant suitable for irrigation without yet considering economics. Tr. 118; U.S. Exh. 1, at 1.

24. *See* Tr. 165; U.S. Exhs. 19, 20.

25. U.S. Exh. 1, app. A.

26. *See* Tr. 253-54; U.S. Exh. 1, at 1.

capacity of such soils,"[27] which translates into an engineering problem of design, management and economics.[28]

The SCS classification of sandy soils, used by the United States, measures moisture retention using the measure 0.1 Bar-15 Bars test. The difference between these two tests is called available water-holding capacity (AWC).[29] The State Parties contend that even the SCS classification requires a minimum average water holding capacity of 2.5 inches per five feet of soil or .5 inches per foot of soil.[30] The United States' soils expert testified that only the SCS standards for California have this lower limit, and, in any event, he made a point of adding that the SCS standards are merely guides.[31] From this I conclude that the standards do not represent rigid limits. The State Parties note some portions of the testimony by the United States' engineering expert where under cross-examination he seemed to imply that .5 inches/foot AWC was required for the continuous move sprinkler systems he projected for the disputed lands.[32] That same expert, however, when asked the question directly, replied that the standard was not an absolute limit for this type of system[33] and that the system he had designed

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27. United States' Opening Post-Trial Brief 64 (May 1981).

28. Tr. 251-52, 176. The United States' expert did later state that the SCS California standards had a lower limit for acceptable water holding capacity. Tr. 339. The Arizona standards, however, do not have a lower limit. *Id.* In any event, the expert emphasized that the standards were merely guides. *Id.* Hence I do not believe they should be taken as rigid limits.

29. Tr. 170-75.

30. Tr. 3156, 3274, 3369-70; S.P. Exh. 21.

31. Tr. 339.

32. Tr. 727-28.

33. Tr. 731-32.

would adequately service crops in these sandy soils, including any problems associated with irrigating those soils.[34] He also stated that this .5 figure was not necessary where drip irrigation was used.[35]

I find that the United States is correct and that this matter under present technology involves sound judgment rather than rigid limits. As a result, I find that the United States' engineering evidence demonstrates the possibility of farming these sandy lands regardless of the low moisture retention capacity.

This conclusion is bolstered by the studies made by the United States of comparable sandy lands presently irrigated. The United States' soils expert prepared a table within his report which compared the water-holding capacities of the claimed lands with the capacities of presently-irrigated lands.[36] The State Parties note that on average the irrigated lands shown in that table have at least a 30% greater water-holding capacity.[37] But some of the irrigated lands also have a lower capacity than the disputed lands. This illustration convinces me that the United States is correct in claiming that lands, with as low a water-holding capacity as the disputed lands, can be farmed with irrigation. The relevant concern then becomes economics in the sense that the costs of an adequate system of irrigation must be measured against the benefits.[38]

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34. *See, e.g.*, Tr. 5672-84, 5729-30, 5765-66, 5769, 5819-20. *See also* U.S. Exh. 1, at 33-36, 40-44, U.S. Exh. 42, at 9-10.

35. Tr. at 731.

36. *See* U.S. Exh. 1, at 46.

37. *See* Tr. 2472-75; S.P. Exh. 23.

38. The State Parties note that no expert for the United States established that these comparable sandy lands were economical to irrigate. State Parties' Post-Trial Opening Brief 20-21 (May 1981); State Parties' Post-Trial Closing Brief 4-5 (June 1981). This argument very nearly amounts to an admission by the State Parties that the proper focus of

2. *Related Deficiencies of Sandy Lands*

The State Parties also note several "related deficiencies of sandy lands" that support their belief that the disputed sandy lands are not arable.[39] They do not present any quantified analysis regarding these aspects of sandy lands.[40] Their presentation on this matter consists mainly of impressionistic statements that indicate some additional difficulties of farming these sandy lands. These arguments as presented are unpersuasive. The United States' experts recognized that such problems exist and accounted for such matters in their projects' design and cost.[41] Moreover, the problems that are raised under the heading of "related deficiencies" appear to be a grouping of several problems discussed more specifically by the State Parties under such headings as moisture-holding capacity, yields, and production costs.[42] Absent a quantitative demonstration on this point, I shall treat these "related deficiencies of sandy lands" as being addressed primarily in the various preceding and succeeding sections of the State Parties' argument.

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this sandy lands dispute over water-holding capacity is the economic focus on devising a system for the more frequent delivery of water used by the United States.

39. State Parties' Post-Trial Opening Brief 22-25 (May 1981).

40. *See, e.g., id.*; S.P. Exh. 26, at II-5 to -6.

41. *See, e.g.*, Tr. 5672-88; U.S. Exh. 42, at 9-11.

42. *Compare* State Parties' Post-Trial Opening Brief at 22-25 *with id.* at 14-21 *and id.* at 25-37.

3. *Economic Analysis of Sandy Lands*

(a) *Introduction*

The State Parties offered as a confirmation of the non-arability of these sandy lands an economic analysis of the yields and costs which they expect would result if these lands were farmed.[43] With decreased yields and higher production costs on these sandy lands, the lands showed a negative payment capacity[44] which meant that farming would be unprofitable before the costs associated with water delivery are considered.[45] I find the State Parties' analysis of payment capacity less convincing than the competing analysis prepared by the United States.

(b) *Yields for Sandy Lands*

The State Parties adjusted their yield predictions for the sandy lands because of the expected lower productivity of these lands. They relied upon the judgment of their soils experts to determine the order of magnitude of the reduction in yield that would be subtracted from the base figure.[46] This reduction was quantified by reference to the SCS Soil Survey of Palo Verde Area, California.[47] That survey indicated that for alfalfa, for example, a yield of 4-6 tons per acre could be expected on sandy soils.[48] The State Parties used the 6 ton figure as their adjusted yield figure.[49]

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43. Tr. 3699-700.
44. Tr. 3701-02, 3707-11; S.P. Exhs. 113, 114, 115.
45. Tr. 3601.
46. Tr. 3702, 3878-79.
47. Tr. 3702, 3879-80, 4326-27; F.Y. Exh. 34.
48. F.Y. Exh. 34, Table 2.
49. S.P. Exh. 113, 114, 115.

The United States relies upon the testimony of its agricultural economics expert in support of its claim that the expected yields would be 7.5 tons per acre on the Fort Mojave sandy lands and 9 tons per acre on the Fort Yuma sandy lands[50] after adjusting for decreased yields on sandy lands. This disagreement is potentially fatal to some of the United States claims because, using the agreed price for alfalfa of $70 per ton,[51] the United States projects only $10 or less net benefits per acre after subtracting cost of delivery of water for the three units in Fort Mojave.[52] Although the State Parties' analysis is competent, I find the United States' yield projections more persuasive.

The agricultural economist for the United States was an expert unusually qualified to make this sort of study and he undertook a comprehensive and detailed analysis of the expected yields for all lands claimed by the United States to be practicably irrigable. His lengthy and impressive experience as an agricultural economist active in economic analysis in the lower Colorado River region was simply unmatched by any other witness in this case.[53] This expert also had direct experience as a farmer in Arizona. In addition, he had served as project leader of a research project for "conducting research in the correlation of economic and physical factors affecting the selection of lands for irrigation."[54] In this capacity, he supervised field experi-

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50. U.S. Exh. 60, at 2, 10-11, 18-19.

51. U.S. Exh. 60, Table A-5; S.P. Exh. 113.

52. U.S. Exh. 60, at 18. On Fort Yuma the disagreement is larger but equally critical. The State Parties estimate that if the United States' yield figure is overstated by only slightly over 1 ton, then the water delivery costs would exceed revenues. State Parties' Post-Trial Opening Brief 28 (May 1981); *see* Tr. 6039-41; U.S. Exh. 60, at 19.

53. *See* Tr. 743-45, 749-50, 752; U.S. Exh. 60, app. F.

54. U.S. Exh. 60, app. F-2.

ments "using irrigation water and fertilizer on various crops . . . to determine the production function or the response of crops upon varying soil qualities ranging from the very good loamy soils down to the other soils at the end of the spectrum which are the lighter soils."[55] This expert was remarkably suited by training and experience to answer this question of yields.

In carrying out his task, he computed an analysis that was notable for its comprehensiveness in relation to this question. He reviewed the relevant literature regarding expected yields for the region as well as drawing upon his own experience in the area. In addition, he interviewed farmers in the immediate vicinity to learn more fully the yields possible from the lands. Finally, he visited each parcel under consideration.[56] His conclusions on the economic feasibility of farming these lands were incorporated into a lengthy report which dealt specifically with expected crop yields and revenues.[57] His analysis resulted in his own projection of expected yields and reductions in yields for sandy lands.[58]

The State Parties contend that this expert's base yields are too high and his reductions in yields on sandy lands are too low. In particular, they claim that he erred in projecting yields possible on the disputed lands if those lands were farmed by the better farmers using a high level of management.[59] They note that this approach which uses the results obtained presently by the most successful farmers is claimed, by the

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55. Tr. 745.

56. Tr. 763-66.

57. U.S. Exh. 60.

58. *See* Tr. 5997-98; U.S. Exh. 60, at 2.

59. State Parties' Post-Trial Opening Brief 29 (May 1981). *See generally* U.S. Exh. 60, at ii, 2, 9, 11-12.

United States, to be indicative of future average results.[60] The State Parties criticize this analysis as comparing future average yields with present average costs and prices.[61] Their expert relied on representative yields derived from statistical reports and confirmed by farm advisors and farmers with knowledge of yields.[62] Their position regarding the magnitude of reduced yields on sandy lands derives its primary support from the Palo Verde Soils Survey which shows lower yields on sandy lands than the yields projected in the study by the United States' agricultural economist.[63] This issue turns upon two sub-issues: whether the State Parties' reliance upon the Palo Verde Soils Survey[64] is preferable to the United States' more specific and detailed inquiry and whether it is error to use the yields from better farmers.

The first issue is relatively easy to answer. The State Parties' expert has in the past analyzed payment capacities of irrigation projects and his work in this case appears to be entirely within generally accepted professional standards. A comparison of his testimony with the United States' economist, however, convinces me that the latter is more within his field of expertise

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60. U.S. Exh. 60, at 9; Tr. 786-89, 866, 6092-93.

61. Tr. 4325-26, 4389-90.

62. Tr. 3659, 3831-32, 3836-37.

63. State Parties' Post-Trial Opening Brief 31-34 (May 1981). They contend that the United States' economist did not lower his projected yields sufficiently to account for these limitations. They do not indicate specifically the reduction that should have been made, but instead return to the Palo Verde Soils Survey from which their expert derived his base yields. *Id.* at 31-32. Both the base yields and reduction questions, thus, appear to turn upon the correctness of using the soil survey yields as opposed to using an approach which incorporates this survey into a much broader study.

64. F.Y. Exh. 34.

on this issue. The work of the United States' economist on yields in this case simply represents another task which perfectly matches his past career. To be sure, his base yield figures were derived from his research of a variety of sources specifically relevant to this case such as publications and interviews with farmers.[65] But that inquiry was merely a natural progression of his ongoing study of such matters in general. His own description of the sources he synthesizes into his expert opinion provides a good summary of the extent of his background and how it relates to this case.

> We maintain as part of our resources extensive data on crop prices and crop yields and we have a pretty good idea what crop yields are and what they are expected to be. That is one reason why I try to stay close to the agricultural production, too. But we review extension publications, talk with extension agents, other consultants who are working directly with the farmers to get their feel for yields in particular areas. And then primarily armed with that information I talk to the farmers then. And I ask them about their yields and what the yields, the average yields were over the last two or three years. And I like to ask them the question, because it is particularly telling, I put it to them usually in this manner: If the section next to you were desert and you were contemplating developing that land, bringing it into production, and you knew you were going to have to make the investment and to do the whole thing, what sort of crop yields would you use in analyzing whether you would develop that or not.[66]

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65. Tr. 759-60, 776-77, 844-45, 990-92, 5989-93, 6093-94.
66. Tr. 759-60.

This witness' basic yield figure represents an estimate derived from a very comprehensive study of the subject matter.

The clearest showing of the superiority of the United States' expert lies in the debate over the proper yield reduction for sandy lands. The State Parties flatly state that "[R]eliance on the Palo Verde survey for sandy lands yields is the correct method."[67] Of course that is the method chosen by their expert. But it is not clear that the State Parties' expert fully appreciated potentially important aspects of this issue. The Palo Verde Soils Survey,[68] relied upon by the State Parties for the expected yields on sandy lands, bears the date of 1974 but contains data collected in the period of 1962-68. The State Parties' expert, however, did not know that the age of some of the data in this Survey was 19 years at the time of his testimony.[69] This statement followed his statement that yields would have improved within the last 20 or 30 years.[70] He did state that he confirmed the ranges of the yields shown in this survey,[71] but the conclusion is inescapable that he did not appreciate the age of this data. As the United States has noted, improvements in yields must be considered to have occurred since 1968, and certainly since 1962.[72] The exact increase applica-

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67. State Parties' Post-Trial Opening Brief 32 (May 1981).

68. F.Y. Exh. 34.

69. Tr. 3880-83.

70. Tr. 3882.

71. Tr. 3883-84.

72. *See* Tr. 6005-06; U.S. Exh. 146. One of the State Parties' experts agreed with the United States on this point, at least with respect to wheat. Tr. 4984. The State Parties criticize U.S. Exh. 146 because the yield increase for Arizona from 1968 to 1979 shown on the exhibit may not apply perfectly for the yield increases expected during that time frame in the more limited region of the lower Colorado River. They also

ble to these sandy lands is a matter of expert judgment. The United States' expert contended that if the State Parties' analysis, based on the Palo Verde Soils Survey, had considered appropriate yield increases, their projections would have been similar to those yields which he projected.[73] The United States' economist considered the Palo Verde Soils Survey in order to develop a percentage reduction in sandy land yields from his base figure for expected yields generally.[74] The ultimate figure adopted was quite properly a matter within his judgment, in which he considered such factors as yields actually achieved on sandy lands in the area.[75] I find this broadly-based analysis to have a more solid foundation than one which is almost exclusively based on a publication which appears to be somewhat dated and thus not likely to render a reliable yield figure by itself.

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criticize it because it shows only the increase for all soil types and not for sandy soils specifically. State Parties' Post-Trial Opening Brief 33-34 (May 1981). This exhibit may not be perfect in its support of the United States' contention that the expected yields have increased for these particular sandy lands. It, nevertheless, is relevant and probative of the general idea that some rational provision must be made for such an increase in expected yield. The actual magnitude of that increase is ultimately a question of expert judgment. If the United States' expert finds the Arizona increase to be generally most appropriate, that is a judgment to be made that is within his expertise. Similarly, he might in his expert judgment conclude that sandy soils would experience a similar increase or he might even conclude that in some particular cases the increase might be slightly above that indicated for Arizona generally. And he is most certainly not limited to applying mechanically that increase to the range of yields given in the Palo Verde Soils Survey if the data known to him combines with his expert judgment to inform him that a higher yield is indicated.

73. Tr. 6005-09.

74. Tr. 5997-98.

75. Tr. 777-80.

I am also convinced that his overall theoretical approach is the most sound as well. His decision to emphasize the yields of the better farmers was consistent with economic theory.[76] As the only true economist to testify, this expert provided the most convincing evidence upon which I can base a judgment regarding whether his use of the better yields and high-level management is consistent with a proper economic inquiry. I should note, however, that his conclusions accord with what I consider to be the sensible approach, because the present inquiry concerns the ability of the lands to produce crops profitably, not the likelihood of any particular person, average or otherwise, to succeed in such an operation. If the land can profitably be farmed by anyone, considering *all* relevant costs and benefits, the land might beneficially be irrigated.

For these reasons, I find the approach and application of the United States to be the preferable method regarding projected yields and would adopt its findings.

(c) *Production Costs on Sandy Lands*

The State Parties also contend that the United States underestimated production costs on sandy lands. Because of the "increased level of activity" necessary to farm these lands, they estimated that the production costs (other than harvest costs) should increase by 25%, a figure that they sought to confirm by an "item by item estimate" of the costs.[77] The State Parties list the items of cost which make up this total 25% increase in production costs: 1) increased capital

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76. Tr. 788.

77. State Parties' Post-Trial Opening Brief 35 (May 1981); *see* Tr. 3706-07, 3904-05, 4342-43, 4407-15; S.P. Exh. 26, Tables C-1, C-4, C-5.

cost of sprinkler irrigation over flood irrigation; 2) increased cost of irrigating more frequently; 3) increased land preparation costs; 4) increased planting costs due to germination problems; 5) increased fertilizer costs; and 6) increased management costs.[78] The total of the increased costs attributable to these items resulted in a 25% increase in overall production costs.[79]

Again I find the United States' evidence more convincing. This finding could be based upon the State Parties' vague and unconvincing approach in this matter. The overall figure of 25% began as a representative number for all production costs based upon the experts' judgment without itemized estimates.[80] When pressed to identify the magnitude of the increases attributable to individual items of production costs, the State Parties' expert was less than clear about the magnitude associated with any particular item among those listed above.[81] Although this expert very confidently stated that he verified the overall figure by an item by item analysis,[82] the vast majority of the cost items were never quantified in any reasonable form that would allow anyone else to check his analysis. Perhaps the depth of his analysis is best indicated in his own words when he described his verification work on this issue as "just the back-of-the envelope type calculation."[83] I cannot accept a figure such as this 25% figure because it combines so many different ele-

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78. *See* Tr. 3706, 3878, 3895-904, 4411-15.

79. Tr. 4342-43, 4408-09. The State Parties' calculation incorporated one decreased cost item, harvest costs. As expected yields would be less on sandy lands, some variable costs in harvest would decrease. Tr. 3710, 3893-94; S.P. Exh. 113, 114, 115

80. Tr. 3706-07.

81. Tr. 3892-905.

82. Tr. 4342-43.

83. Tr. 4409.

ments which are subject to individual variation. I have no reasonable method of knowing if the cost increases truly add to the total given by the expert. I am more convinced by the United States' economist's opinion that many of these costs would not increase as projected by the State Parties,[84] primarily because his inquiry was tailored from the start to deal with conditions existing on the individual parcels of land.[85] In short, I agree with his conclusion that a 25% cost increase for these items "seems totally out of line."[86] In choosing between expert opinions I believe the opinion offered by the United States is persuasive.

Moreover, I am not certain that any meaningful disagreement exists over some items or that other disagreements have been effectively presented. For example, the United States analysis does include an increased cost figure for fertilizer on sandy lands.[87] In addition, the largest cost increase for irrigating sandy lands mentioned by the State Parties' expert was the capital cost using sprinkler irrigation on the farm lands rather than gravity irrigation. The gravity system was estimated by the State Parties' expert to cost $400 per acre while the sprinkler on-farm system would cost between $800 to $1,000 per acre.[88] The State Parties' analysis of this issue simply criticizes the United States' agricultural economist for minimizing this aspect of the problems associated with farming sandy lands and notes that the economist would never increase his costs for increased costs associated with sprinkler irrigation because his payment capacities do

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84. Tr. 6029-35.
85. *See* U.S. Exh. 60.
86. Tr. 6035.
87. *Id.*
88. Tr. 3902.

not include on-farm irrigation system costs.[89] This latter observation, although true, is misleading and illustrates a major difficulty in attempting to approach this question in the manner used by the State Parties. The State Parties' argument implies that there is some additional cost factor associated with sprinkler systems that the United States has failed to include in its studies. The United States has always proposed sprinkler systems for irrigating these sandy lands and has clearly indicated the costs estimated to be appropriate for such on-farm systems as projected.[90] The United States did not overlook the desirability of using sprinklers on these sandy lands and it prepared cost analyses of such systems. The State Parties, on the other hand, did not design on-farm systems and merely took a per-acre cost estimate.[91] Moreover, the cost of systems that have actually been built support the United States' estimate.[92] The State Parties' presentation regarding the cost of sprinkler irrigation systems hardly impairs the persuasiveness of the United States' detailed cost analysis. The State Parties' expert merely states, with reference to on-farm capital costs, that sprinklers cost more than flood irrigation, but he does not specify how the United States has erred.[93] From

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89. State Parties' Post-Trial Opening Brief 36-37 (May 1981). *See* Tr. 961, 6029-35.

90. *See* Tr. 490-94, 5604-05, 5841-43; U.S. Exh. 42, at 30-35, 37, Table 7, Table 10, app. B, app. C.

91. Tr. 3874-76, 3878.

92. Tr. 5604-06, 5841-43, 490-94.

93. Any comparison on this state of the evidence and argument is hampered by some differences in the manner of presentation adopted by the parties. The United States' capital cost estimates for irrigation systems include costs for the distribution system, required to bring the water to the edge of the farm, as well as the costs for the on-farm system, such as sprinklers, required to apply the water to the land. *See* U.S. Exh.

the arguments presented, I simply cannot tell precisely to what extent the State Parties' 25% increase in costs is already accounted for in the United States' figures. In any event, I am more impressed with the detailed analysis performed by the United States' experts.

I conclude that the United States' cost projections are convincing.

C. *Gravelly and Cobbly Soils*

The State Parties next contend that approximately 1,800 gross acres claimed by the United States as practicably irrigable contain such amount of gravel or cobble[94] to be non-arable, lacking a positive payment capacity.[95] These disputed lands located on the mesa areas of the Reservations consist of major portions of the projected farming units known as FM-5, Calada, CH-4, as well as a smaller portion of CH-3.[96] The State Parties' soils expert classified this land as either suitable only for permanent crops such as tree or vine crops or unsuitable for any crops.[97] As confirmation of this conclusion, they computed payment capacities for

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42, app. B. The State Parties include only the capital cost of the distribution system in their capital cost of irrigation facilities. S.P. Exh. 26, at IV-7 to -14. The on-farm delivery costs of water appear as charges against annual benefits used by the State Parties in arriving at an annual payment capacity per acre. S.P. Exh. 26, at V-1 to -5, app. C. The State Parties would adjust the payment capacities in Appendix C of their experts' report, S.P. Exh. 26, to account for a difference of cost resulting from the use of sprinklers. *See* Tr. 3902.

94. Gravel consists of rock particles from meters to 3 inches in diameter. Cobble consists of rock particles from inches to 10 inches in diameter. Tr. 150, 199-200, 3305; S.P. Exh. 26, at II-6 to -7.

95. State Parties' Post-Trial Opening Brief 37 (May 1981); S.P. Exh. 110, Tables B-1, B-3.

96. S.P. Exh. 110, Tables B-1, B-3; S.P. Exh. 26, at B-13 to -16, B-18, B-25 to -28.

97. Tr. 3157-82.

these areas for both field crops and permanent crops and decided that no crop would generate a positive return if the yields and costs were adjusted to allow for the physical character of the soils.[98] From these analyses they conclude that this land cannot be "practicably irrigable."

The United States disputes these conclusions. It contends that the lands are not so rocky as the State Parties claim and that lands with some gravel or cobble may still be farmed economically.[99]

The result of this inquiry, like that of many others depends upon what is believed to be the question. The State Parties claim that there is "some difference between the experts as to what they observed" but the "more important difference between the experts is not in what they observed, but in how the gravel and cobble in these soils affect crop suitability."[100] This astounding statement slights the substantial attempt made by the United States to demonstrate that these lands were not so gravelly or cobbly[101] as the State Parties had claimed in their expert's report.[102] The State Parties operating from the false premise then attempt to demonstrate that lands, as rocky as they

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98. *See* Tr. 3651-53, 3716-17; S.P. Exh. 26, at II-7 to -8; Tr. 3720-24, 3891-92; S.P. Exhs. 113, 116. The State Parties did consider the soils suitable for generating a positive payment capacity if grapes are considered. Tr. 3652-53, 3692-94, 3698, 3713-14. Once water delivery costs are fully considered, however, even grapes would be a losing venture, according to the State Parties who also believe that this region's climate will not sustain grapes in any event. *See* State Parties' Post-Trial Opening Brief 38 n.4 (May 1981).

99. United States' Opening Post-Trial Brief 74-79 (May 1981).

100. State Parties' Post-Trial Opening Brief 40 (May 1981).

101. *See* Tr. 128-29, 138-55; U.S. Exhs. 23, 25-32, 22 DD, 22 EE, 22 GG, 22 HH, 22 II, 22 JJ, 22 KK, 22 AAA, 22 BBB, 22 CCC, 35-37. *See also* Tr. 3299-307 (cross-examination of State Parties' soils experts).

102. S.P. Exh. 26, at B-13 to -16, B-18, B-25 to -28.

claim these lands to be, cannot be farmed economically. A demonstration that these lands cannot be irrigated within economic practices is, of course, aided by an assumption that the land was so rocky that often sufficient exploratory pits could not be dug or that 50-80% of the surface was covered by up to an inch of gravel.[103] That assumption I cannot make in light of the substantial evidence to the contrary introduced by the United States. In fact, I believe that the United States' position is correct. The United States' expert originally classified this land as arable or irrigable[104] and specifically reexamined these lands to confirm his original analysis.[105] Upon review of the evidence I find that presentation persuasive. Having reached that conclusion, I find the United States' evidence on yields and costs applicable to farming these lands to be closer to the mark and persuasive.[106] Because these findings rest on the facts presented, a specific discussion of the evidence relating to some of these lands might be useful.

1. *Physical Analysis of the Parcels*

The nature of this factual inquiry presents some very difficult obstacles to a factfinder. The broad issue is which side's evidence more fairly represents the actual character of these disputed tracts of lands. Any conclusion must rest on the testimony of the competing experts and the record exhibits. But the inquiry is such that precise findings are not possible. No Court

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103. *See* State Parties' Post-Trial Opening Brief 40 (May 1981); Tr. 3157-58, 3174-75, 3338-40.

104. U.S. Exhs. 1, 2, 3, 5, 6.

105. Tr. 137-59.

106. *See* Tr. 763-95, 5716-20, 5998, 6035-38, 6056-62.

can determine exactly the character of each square foot of this land. The acreage involved is considerable and the non-technical evidence presented offers only brief glimpses of the lands. From these bits and pieces I am afforded my only opportunity to test the broader opinions of these soils experts. A review of the evidence reveals that the United States' expert appears more reliable. This observation joined with the evident care and attention to detail in the report by the United States soils expert[107] makes his opinion overwhelmingly convincing.

(a) *The Calada Unit*

Perhaps the greatest disagreements centered upon the disputed character of the Calada Unit. The United States' soils expert found that on the surface "there are some small gravels occasionally. Cobbles were rare. . . . And as I indicated the lower part of the [60 to 80 inch soil] profile is very gravelly."[108] The State Parties' soils expert described this land as "undulating . . . cobbly and gravelly in places" on the surface and "rather cobbly" soils in those places where the land was not so rocky as to prevent his digging.[109] Although this is a question of degree, the disagreement is clear.

The State Parties' expert, in addition to the testimony quoted above, added several details supporting his conclusions. He stated that the soil on this unit was so cobbly that often a sufficient hole could not be made and that backhoe holes made by someone else prior to his second visit to the area revealed solid

107. U.S. Exh. 1.
108. Tr. 150.
109. Tr. 3157.

cobble in the subsoil from 12 to 18 inches in depth.[110] These conclusions only applied to the northern two-thirds of the Calada Unit (484 acres).[111]

Some objective evidence supports this position. This witness examined a photograph that was later admitted into evidence.[112] This photograph reveals almost solid cobble in the soil profile shown, and the soils expert stated that "if anything, it is a little less cobbly than what I saw in the holes that were dug."[113] One other photograph of the northern Calada Unit produced by the State Parties shows a somewhat less extreme concentration of cobble, but the soil is still very cobbly in that second view.[114] Thus, the State Parties' position is supported by evidence showing some cobbly land in the northwest portion of the Calada Unit.

But that much was admitted by the United States' expert. He acknowledged that near the top of the northwestern escarpment there were cobbly or gravelly areas exposed where erosion had washed away the topsoil.[115] But such areas were on the margins of the Calada Unit.[116] That evidence hardly establishes the typical character of the Calada Unit. The pictures of the northwest Calada Unit introduced by the State Parties for the most part depict the extreme boundaries of that parcel[117] if they depict the unit at all.[118]

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110. Tr. 3158.

111. Tr. 3299-301.

112. S.P. Exh. 46. This photograph depicts a road cut near the northwest edge of the Calada Unit. Tr. 3537-38.

113. Tr. 3159.

114. S.P. Exh. 106 (photo F-36).

115. Tr. 342-43.

116. Tr. 344.

117. *Compare* S.P. Exhs. 46, 86, 106 (photo F-36).

On the other hand, the State Parties have also introduced two other photographs of the northern part of the Calada Unit.[119] These photographs show a vast expanse of flat land with scattered surface gravel.[120] In fact, these photographs show land remarkably similar to that shown in the United States' photograph taken somewhat to the north and west.[121] Thus, by the State Parties' own evidence there is some reason to question whether their expert correctly characterized the soil of the entire northern Calada Unit.

The question is fully settled by a review of the evidence offered by the United States. Its soils expert returned to the Calada Unit to confirm his original classification following the State Parties' claim that the land was too gravelly or cobbly. He dug nine test pits scattered throughout the parcel to confirm his findings.[122] This reexamination did in fact confirm his previous classification.[123] The surface soils varied from

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118. The witness who supplied the foundation for these exhibits testified that he located his position on the map by the reading on his car's odometer. Tr. 3538-39. Given the undisputed fact that the pictures were taken near the border of the unit, the photographs might very easily depict lands just out of the unit if a reasonable margin of error is allowed. There is some reason to doubt the precise location of the areas in these photographs. *See also* Tr. 3560-61. *Compare* S.P. Exh. 86.

119. The State Parties did introduce two photographs showing cobbly soil in the southern Calada Unit. *See* S.P. Exh. 106 (photos F-31, F-33). The State Parties do not, however, claim that the southern portion is too cobbly to use for field crops. *See* Tr. 3299-301. Photo F-33, however, does confirm my belief that many of these cobbly areas on the Calada Unit are relatively small in relation to the unit as a whole. That photograph shows large cobbles in the foreground and shows in the background a large expanse of flat land.

120. S.P. Exh. 106 (photo F-3, F-4).

121. *Compare* U.S. Exhs. 23, 22DD *with* S.P. Exhs. 86, 106 (photo F-3, F-4).

122. Tr. 137-38.

123. Tr. 138-52.

loamy sand to gravelly sand.[124] The sub-surface soils often contained gravel beginning at depths ranging from 21 to 47 inches.[125] He found cobble in the northern Calada Unit in only one test pit beginning at a depth of 23 inches.[126] His conclusions are effectively summarized in documentary form and supported by photographic evidence.[127] This evidence was a thorough and systematic proof of the United States' position.

The opposing expert's reply was unconvincing. In examining two of the photographs[128] of these pits the State Parties' soils expert grudgingly admitted that the lack of cobble in the upper portion of the soil profile made the area surrounding the pits suitable for field crops, although he had classified them as suitable solely for permanent crops.[129] The photographs of the other four test pits made in the northern Calada Unit were not shown to this witness.[130] Although some of those four pits show more gravel than the first two, none of the photographs introduced by the United States shows amounts of gravel and cobble approaching the amount which the State Parties' expert indicated was typical of the Calada Unit soils.[131] The State Parties' soils expert did not present any photographs depicting the soil profiles upon which he claimed to base his opinion. His response to the United States' evidence which rebutted his conclusion was to state

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124. U.S. Exh. 23.

125. *Id.*

126. *Id. See* Exh. 22JJ.

127. *See* U.S. Exhs. 22DD, 22EE, 22GG, 22HH, 22II, 22JJ, 22KK, 22AAA, 22BBB, 22CCC, 23-32.

128. U.S. Exhs. 22AAA, 22BBB.

129. Tr. 3301-06.

130. *See* U.S. Exhs. 22EE, 22GG, 22JJ, 22KK.

131. *See* Tr. 3158-59; S.P. Exh. 46.

simply that such evidence indicates the variability of the soils in that unit where some small parts might be arable.[132] He later implied that the United States' soils expert may have chosen to dig sample pits in specific areas where the results would be more likely to favor the United States.[133] This witness based his most specific opinion on an unspecified number of pits which he discovered in the Calada Unit and which he stated showed cobble at depths of 12 to 24 inches.[134] I consider significant this witness' failure to support his testimony with documentary evidence. He never offered proof, such as photographs, field charts of soil profiles, or soil classification maps, that generally contradicted the evidence submitted by the United States.[135] Neither did he attempt to account for the alleged "variability" of the northern part of the Calada Unit in any manner except to pronounce the northernmost two-thirds of the parcel to be non-arable. I must conclude that the better-documented and more precise proof presented by the United States soils expert is more nearly correct regarding the physical character of the Calada Unit. Perhaps the State Parties are correct to the extent that certain small portions of the northern part of the unit contain a good deal of cobble[136] as illustrated in the much-discussed photograph of a road cut on the northwestern edge of the unit. But considering all the documentary evidence, that photograph cannot justify a finding that the northernmost 484 acres of the unit is generally as gravelly or cobbly as

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132. Tr. 3306.

133. *See* Tr. 3469-70.

134. Tr. 3469. The record does not indicate who made these pits.

135. *Compare* U.S. Exhs. 2, 3, 22DD, 22EE, 22GG, 22JJ, 22KK, 22AAA, 22BBB, 23-32.

136. *See* S.P. Exh. 46.

the State Parties claim.[137] Furthermore, having claimed that the unit is "variable," the State Parties give me no reason based on either testimonial or documentary evidence to exclude from further consideration the rocky portion of the northern unit. The United States presented a sound general case and in addition attempted to specifically rebut the State Parties' claim regarding the stoniness of this parcel of land. The United States proceeded as far as one party reasonably could to prove its position with specific examples. Any further demands upon the proof by that party would approach a requirement that it prove a negative. Absent more specific evidence from its opponent, the United States' case is convincing.

(b) *Unit FM-5*

Another unit alleged by the State Parties to be too gravelly and cobbly to farm is FM-5. Although it is clear that for this reason they dispute the arability of

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137. Indeed, the State Parties do not call my attention to any of the photographs or other exhibits entered on their behalf regarding the "gravelly and cobbly" soils. My citation of such exhibits as S.P. Exhs. 46, and 106 derives from my independent review of the record. From such exhibits I can merely conclude that the extreme margins of the Calada Unit are cobbly, an admitted fact. *See* note 102 and accompanying text *supra*. The United States, on the other hand, cites numerous exhibits showing the physical character of the land. *See* United States' Post-Trial Opening Brief 75 (May 1981). Given the volume of exhibits in this case, I must rely to a large extent upon the adversary system to call to my attention the relevant evidence in the record. The State Parties' failure to cite any documentary or objective evidence rebutting that cited by the United States causes me to believe that such evidence is not in the record. That belief is confirmed by my own recollection as well as my independent review of the record. I can only conclude that no evidence in the record justifies a finding that the entire 484 acres found irrigable by the United States is so cobbly or gravelly that the entire amount cannot be practicably irrigable.

large portions of this unit, the particular acres under dispute for this reason and their location are not clearly defined.[138] The State Parties' soils expert testified that these allegedly gravelly and cobbly lands were very similar to the soils found in the Calada Unit.[139] The United States' expert rested upon his initial opinion that the lands were irrigable.[140] Under these circumstances I find, consistent with my findings regarding the similar Calada Unit, that the United States characterization of these soils is correct.

The State Parties did introduce several photographs of this unit showing very rocky soils but such photographs appear to have been taken in areas classified as non-irrigable by the United States' soils expert.[141] Because the State Parties do not attempt to connect these lands to the specific areas they excluded for its gravelly or cobbly character rather than those excluded because they are non-arable for any crops, they give me no basis to use these photographs in this manner.[142] And I believe that these photographs merely show that there are cobbly areas near the extreme margins of the areas classified as irrigable by the United States' soils expert. For the reasons given with regard to my decision on the Calada Unit, I am unpersuaded that such evidence justifies exclusion of all

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138. *See.* S.P. Exh. 26, at B-13 to -16; Tr. 3160-62; State Parties' Post-Trial Opening Brief a-8 (May 1981).

139. Tr. 3161.

140. *See* U.S. Exhs. 1-3.

141. *Compare* U.S. Exh. 3 *with* S.P. Exhs. 86, 96-101. Indeed, the testimony offered regarding the location of the areas depicted in these photographs can only be described as confused and inconsistent. Tr. 3543-57. Therefore, some of these photographs might very well depict lands not on the allegedly irrigable lands of Unit FM-5.

142. The photographs may show such cobbles which at some depth underlay the units of Calada and FM-5.

areas of a parcel classified as generally irrigable by one party.

(c) *Unit CH-4*

The State Parties excluded as gravelly and cobbly approximately 937 acres from the unit on the Chemehuevi Reservation known as CH-4.[143] The State Parties' soils expert found 50-80% of the surface area covered by gravel with frequent patches of cobble.[144] The United States' soils expert, on the other hand, found the surface to have 30-40% gravel with only scattered cobble.[145] This latter expert originally classified this area as irrigable and later confirmed his initial classification on a second trip during which he dug three sample pits to observe the soil profile.[146] From these conflicting reports, there exists a fact dispute regarding the amount of surface gravel on the unit.

There is no question that this land is covered by a considerable amount of gravel. The State Parties' photographic evidence of lands within these sections claimed by the United States to be irrigable clearly shows a substantial amount of surface gravel.[147] In fact, there are portions of the unit which have surfaces 50-80% covered with gravel as stated by the State Parties' expert.[148]

On balance, I believe that the United States' expert more fairly represented the typical character of the surface soil. The State Parties' expert thought the

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143. S.P. Exh. 26, at B-26; S.P. Exh. 110, Table B-3.
144. Tr. 3174-75.
145. U.S. Exh. 1, at 62; U.S. Exhs. 35, 36, 37.
146. *See* Tr. 153-55; U.S. Exhs. 35, 36, 37; U.S. Exh. 1, at 62.
147. *See* S.P. Exh. 107.
148. *See* S.P. Exh. 49.

photographs showing the greatest amount of gravel and cobble depicted views typical of the soil in the unit, although the other photographs clearly show less gravel and cobble.[149] The United States' expert has consistently recognized that a significant amount of gravel covered this land. He originally classified this land as containing "gravel, cobble or stoniness in the surface and subsoil."[150] This classification matches that given the surface and subsoil of land on this same Reservation found to be irrigable in the earlier proceedings of this case.[151] Thus, I am convinced that the gravelly character of this land should not result in a striking of the water rights claims appurtenant to this parcel.

(d) *Unit CH-3*

The State Parties raise a similar question regarding the rockiness of Unit CH-3 on the Chemehuevi Reservation. My findings are the same as those for CH-4 be-

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149. *See* Tr. 3176-77.

150. *See* U.S. Exh. 6.

151. *See* Pr. U.S. Exh. 1208. The State Parties note that the majority of CH-4 is classified by the United States' expert as BIA Class IV soil, U.S. Exh. 6, which is designated as suitable for "permanent" crops, U.S. Exh. 1, at 3. *See* State Parties' Post-Trial Opening Brief 40 n.5 (May 1981). With this information the State Parties argue that none of the crops projected for this unit are permanent crops and thus the land cannot be practicably irrigable. Even the State Parties at least implicitly recognize that this argument is overly broad because much acreage which is claimed on other Reservations to be irrigable but not subject to such dispute is Class IV land. In addition, the United States' expert noted that although the BIA Standards indicate that Class IV land is suitable for permanent crops, they do not restrict the class to that type of crop. Tr. 119. This testimony derives substantial support from the projection of alfalfa and small grain crops on the Colorado River Indian Reservation, including the Class IV lands, by the experts who worked with these standards in the earlier proceedings. Pr. Tr. 14524.

cause the disputed gravelly/cobbly lands are similar on both units.[152]

(e) *Summary of Physical Analysis*

The State Parties discuss at length the difficulties associated with farming gravelly and cobbly soils.[153] This list includes such items as rock-damage to farm equipment and yield reductions due to germination problems as well as rock-damage to plants. From this assortment of agricultural headaches the State Parties conclude without any analysis of costs and benefits that these lands cannot be farmed with field and row crops. They then state that the United States' experts provided no evidence to negate these conclusions.[154] Of course, it is impossible to refute the broad proposition that rocks damage farm equipment. Anyone would probably agree that running a plow through a field totally covered with eight-inch cobbles would be uneconomic farming. Most situations, including the present one, however, lack such clarity. This view holds particular importance where the parties disagree over the amount of gravel and cobble on this land and where I have found that the land contains significantly less rocks than alleged by the State Parties. Their argument thus lacks a vital part of its foundation.

This issue eventually turns upon the soils classification of the two competing experts. The United States' soils experts classified these lands as irrigable under the objective BIA Standards designed for the soils in the lower Colorado River Valley.[155] The standards

152. *See* Tr. 3179; *see also* S.P. Exhs. 82-85, 107.
153. State Parties' Post-Trial Opening Brief 40-47 (May 1981).
154. *Id.* at 42.
155. *See generally* U.S. Exh. 1, at 3.

used by the State Parties' soils expert may be derived from his lengthy experience in soil classification,[156] but those standards are certainly ill-defined and incapable of objective verification.[157] As indicated above, I believe that the State Parties and their experts also have overstated to some extent the degree of rockiness of these soils.[158] The United States appears to have more correctly classified these lands in soil categories that indicate their suitability to farming. Other lands containing a significant degree of gravel and cobble are now farmed at nearby locations.[159]

The State Parties' soils expert classified these lands as better suited to trees and vines than the field and row crops projected by the United States' experts.[160] Permanent crops are discarded by the State Parties at a later stage. These lands may be "very poorly suited" to field and row crops, but if that much is true, the appropriate inquiry should be the effect of such gravel on costs and yields as experienced by others who had farmed such land. But the State Parties' soils expert did not make such inquiries.[161]

Under these circumstances, I should not find these lands to be non-practicably irrigable because of alleged difficulties generally associated with gravelly lands.

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156. *See generally* Tr. 3064-91.

157. In fact, this soils expert testified at trial that: "I did not follow any specific set of standards. The standards are in my head." Tr. 3262.

158. *See* note 101 and accompanying text *supra*.

159. *See* Tr. 6056-60; U.S. Exhs. 148-59.

160. Tr. 3291-94, 3299.

161. Tr. 3294-99.

2. *Economic Analysis of Gravelly and Cobbly Lands*

Anticipating my findings regarding their qualitative analysis of the gravelly lands, the State Parties also offer a quantitative analysis of the irrigability of these lands.[162] They challenge both the productivity and cost figures for these lands. The United States naturally disputes this quantitative analysis adhering to its original estimates.

I find that the United States presents the more convincing case in this issue. A lengthy discussion of the reasons for my decision is not necessary. This gravelly lands question involves many considerations similar to those factors which influenced my decisions regarding yields and production costs applicable to sandy soils.[163] For example, the State Parties have again found the Palo Verde Soils Survey to be dispositive regarding the yields expected on gravelly lands,[164] and they have found that gravelly lands merit a 25% increase in production costs beyond costs for normal lands, the same increase which they found appropriate for sandy lands.[165] I have found the identical arguments relating to sandy lands to be unpersuasive. For the sake of consistency as well as logic I find the State Parties' comparable views regarding gravelly lands to be unpersuasive and would only note in general that the United States' view is well-supported by the record.[166]

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162. State Parties' Post-Trial Opening Brief 47-54 (May 1981).

163. *See* notes 46-93 and accompanying text *supra*.

164. *See* State Parties' Post-Trial Opening Brief 49-51 (May 1981).

165. *Id.* at 52-54.

166. Tr. 905-10, 5997-99, 6035-38, 6056-68; U.S. Exhs. 146, 148-59. *See also* Tr. 5872, U.S. Exh. 42, at A-16 to -17.

Despite that conclusion a few further comments are perhaps in order. First, I note that an additional reason for following the United States' analysis is my belief that the State Parties' yield and cost estimates are based upon an inaccurate perception of the gravel or cobble content of the soils on these parcels.[167] Second, I believe that some of the statements in the State Parties' brief are misleading. For example, they state that the United States' economist, although projecting a cotton yield of 1125 pounds per acre on gravelly lands, gave only one example of a cotton yield on gravelly soils and that figure was 1,000 pounds per acre.[168] This statement overlooks the later testimony by this witness where he stated that one farm with gravelly soil obtained cotton yields of between 1,250 to 1,500 pounds per acre, a figure significantly exceeding his projection for the disputed gravelly lands.[169] Such considerations confirm my belief that the United States is correct on this question and the gravelly lands should not be excluded from being practicably irrigable.

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167. *See* notes 100-06, 158 and accompanying text *supra*. This statement applies with more force to the analysis of the Fort Mojave Reservation units which I believe contain relatively less surface gravel than the units on the Chemehuevi Reservation.

168. State Parties' Post-Trial Opening Brief 51 (May 1981); *see* Tr. 905-08.

169. *See* Tr. 6059-61. The State Parties later attack the qualifications of this witness to testify that the other farms had soils similar to that in the Reservations. State Parties' Post-Trial Closing Brief 6 (June 1981). This agricultural economist may not be a soil classifier but in considering yield and cost questions he must be able to consider such relevant factors as the amount of gravel in the soil and how that would affect yields and costs. And in that context his job must entail comparisons between soils of different parcels.

D. *Inclusion of Non-arable Lands in United States Claims*

The State Parties next question the United States claim of water rights for non-arable or non-irrigable lands which were included in the proposed irrigation units to "square-off" the units.[170] This issue concerns lands other than those alleged by the State Parties to be too sandy or gravelly.[171] The United States contends that the units as designed by their experts include this non-arable land because a farmer would include these non-arable parcels in order to serve efficiently the arable lands.[172] This dispute concerns approximately 1,200 acres. The parties however do not agree precisely upon the acres which fit this description.[173] I believe that the State Parties, in excluding this land, have generally adopted the correct approach

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170. State Parties' Post-Trial Opening Brief 54-58 (May 1981).

171. *See* S.P. Exh. 110.

172. United States' Post-Trial Opening Brief 88-91 (May 1981). *See* Tr. 503-06, 902-03; U.S. Exh. 42, at 34-35.

173. For example, the United States' soils expert classified a portion of Unit FM-9 as having soil that is non-irrigable but the United States claimed water rights for the entire unit including the admittedly non-irrigable portions. The State Parties, however, concede that the entire parcel is not only arable but practicably irrigable. *Compare* U.S. Exh. 3 *with* S.P. Exh. 110, Table B-1. The amount of these disputed lands on each Reservation are:

	U.S.	S.P.
Cocopah	10	56
Fort Yuma	84	179
Chemehuevi	329	405
Fort Mojave	776	522
	1199	1162

U.S. Exh. 1, at 54, 57, 65, 69; S.P. Exh. 110, Tables B-1, B-3, B-4, B-5. In the context of the total amount of land involved in this dispute, the parties are separated by only 37 acres. But to the individual Tribes the difference is significant.

and find that this land which is non-irrigable or non-arable is not practicably irrigable and does not qualify for additional water rights.

The State Parties' argument, as I understand it, is that the percentages of non-arable lands included by the United States in the proposed farming units is too high and must be reduced to a reasonable figure.[174] The United States' expert stated that the non-arable lands were included to allow for a more efficient irrigation of the contiguous arable land.[175] The State Parties' expert seemed more convincing in his testimony that there were equally satisfactory methods of squaring off the parcels without the inclusion of such a great deal of non-arable land.[176] This conclusion seems particularly well illustrated by the inclusion of a large amount of non-arable land on the northern end of CH-4.[177] The United States argues that this witness was insufficiently familiar with the individual parcels to draw this conclusion.[178] Strictly as a matter of common sense I agree with the State Parties because it is inconceivable that some of these large amounts of non-arable land are necessary to square off the irrigation units when this land is found on the extreme margins of units and equally squared up units can be fashioned with less non-arable land.

Other than this judgment decision, the United States presents for its position no detailed and systematic engineering arguments such as an inability to efficiently design a smaller irrigation system for each par-

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174. Tr. 5187-93.

175. *See* Tr. 503-07; U.S. Exh. 42, at 34-35.

176. Tr. 5190-92.

177. *See* U.S. Exh. 6.

178. United States' Post-Trial Opening Brief 89-90 (May 1981). *See* Tr. 5310-20.

ticular parcel of arable land. The United States does argue in some instances either that the land could be improved to arable status by various operations such as rock-picking or that the land is currently farmed.[179] This argument implicitly means that the United States' initial soil classification was erroneous and these portions classified as non-irrigable or non-arable are actually irrigable. The United States' soils expert performed in an extraordinarily scientific and persuasive manner. Although the United States at other times has decried the methods utilized by the State Parties' soil expert who used standards that were either ill-defined or unverifiable, the United States, at this point, appears to be undertaking just the sort of analysis it otherwise has criticized. I remain persuaded by the soils expert who testified for the United States. The State Parties correctly would reduce the area of the irrigation units by deleting the excessive inclusions of non-arable lands on the margins of the units.

But I believe that the State Parties have not gone far enough in their argument. In my view the relevant inquiry with regard to these lands is whether each identifiable portion of reservation land is practicably irrigable. Both sides have approached this question as if it were a matter of which lands would a farmer include in a farming unit. But that is not the proper inquiry in this case. When a soils expert classifies a parcel as non-arable or non-irrigable, ordinarily the land will not be further considered for farming because that land by itself cannot profitably produce crops. If that land is cultivated it would only be done in order to farm the higher quality land adjacent to such poorer

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179. United States' Post-Trial Opening Brief 88-90 (May 1981). *See* Tr. 503-07.

land. That fact alone does not justify a grant of additional water rights to the non-arable land. In this light, the Master in the prior proceedings did not recommend water rights for lands classified as non-irrigable or non-arable under the BIA standards even if they were within the irrigation units.[180]

All land classified as non-irrigable or non-arable should now be excluded from consideration for water rights. The State Parties' figures are not designed to accomplish that result because they have sought to reduce the non-arable inclusions to a reasonable level. The United States' figures are the only ones which contain all non-arable acres included in its proposed irrigation units. In addition, I have already found the United States' soils expert to be the more reliable classifier. For these reasons I find that the 1,199 gross acres within the proposed irrigation units found non-arable or non-irrigable by the United States' soils expert should not be awarded water rights.[181]

E. *General Cost Differences*

The State Parties also dispute the United States' projected cost figures for the construction and operation of the proposed irrigation systems. Previously discussed cost disputes have focused upon the costs associated with different types of lands, but this dispute involves costs relevant to all parcels. If their figures are adopted, the State Parties calculate that various

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180. The exhibits seem to incorporate this approach. *Compare* Pr. U.S. Exh. 1207 *and* Pr. U.S. Exh. 1208 *with* Pr. U.S. Exh. 1210. The discussions in the earlier proceedings confirm this conclusion. Pr. Tr. 12779-82, 12807-08, 13103-15.

181. *See* U.S. Exhs. 3, 6, 14, 17.

amounts of acreage on several parcels are not practicably irrigable.[182]

The difference in the parties' estimates occur in three areas: capital costs; operation and maintenance costs; and power costs. Each area of dispute invites separate inquiry.

1. *Capital Cost*

The first area of dispute concerns the capital cost of building the irrigation systems. The State Parties title their discussion of this area "Debt Service."[183] This label was adopted apparently because of the differences which appear in figures shown as annual amortized costs. But the parties substantially agree upon the appropriate figures to be used in converting costs to an annual basis. Both use a 40-year repayment period.[184] The State Parties use a 7⅛% interest rate while the United States uses a 7% interest rate. The State Parties acknowledge that the real differences between the parties do not lie in the minor difference in the rate of interest used.[185] The significant differences

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182. The exact figures are:

1) 120 acres on FM-3
2) 106 acres on FM-5
3) 95 acres on Quail Hollow
4) 231 acres on Calada
5) 43 acres on FY-4
6) 19 acres on FY-10
7) 11 acres on FY-11

State Parties' Post-Trial Opening Brief 58 (May 1981); S.P. Exh. 110, Tables B-1, B-5.

183. State Parties' Post-Trial Opening Brief 64 (May 1981).

184. *Id.*

185. *Id.* at 64-65.

occur in the cost figures used for the hardware needed to construct a system.[186]

The major reason for this difference, according to the State Parties, is the failure of the United States to design irrigation systems that would "comply with federal standards in order to be eligible for federal financing."[187] Although the State Parties imply that the United States' engineers erred in designing a system that does not meet those standards, the State Parties offer no reason for meeting such standards other than the implied availability of federal financing.[188] The State Parties by their lack of supporting reasoning

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186. For example, the State Parties note that they estimated the cost of a 40 horsepower pumping plant to be $40,000, while the United States estimated the cost of a 50 horsepower pumping plant to be $20,000. *Id.* at 65-66. *See* S.P. Exh. 26, at IV-8; U.S. Exh. 42, at A-7.

187. State Parties' Post-Trial Opening Brief 66 (May 1981). *See* Tr. 660-61, 3668. The State Parties also note that the United States' cost figures include no amount for fish screens. *See* Tr. 5708. Such screens are allegedly required by the Environment Protection Act and accompanying regulations. State Parties' Post-Trial Opening Brief 65-66 (May 1981); Tr. 3731. The State Parties in their brief and cited testimony do not indicate the cost of fish screens. They thus give me no rational basis upon which to adjust the cost estimates of the United States even if such screens are required. Absent some quantification by the State Parties, I will not consider this factor. In addition, the State Parties have failed to cite the relevant law which they claim requires these screens. Such action confirms my belief that the United States' expert was correct that the screens are not required because recent projects in the area do not have such screens. Tr. 5709. Furthermore, this expert presented evidence that if the cost of these screens were translated into a "per acre" cost the amount would be almost insignificant, between 80 cents to one dollar. Tr. 5714.

188. Even the State Parties' analysis does not consistently follow this approach. Although they assert that "an interest rate of seven per cent [is] typical of federally funded projects," State Parties' Post-Trial Opening Brief 64 (May 1981), they cite no authority for that proposition and their own expert testified that "[t]ypically in Bureau of Reclamation projects that portion of the project allocable to irrigation service does not bear interest." Tr. 5364.

have failed to convince me that the projects under consideration must meet federal financing standards. There is thus no reason to reject the United States' capital cost figures.

This conclusion does not mean that the United States erred in using a 7% interest rate in its economic analysis. The State Parties apparently believe that the 7% rate was chosen as the federal financing rate. The United States' economist, however, chose that rate because an economic analysis will commonly employ a rate such as the federal discount rate which, during the relevant time period, was approximately 7%.[189] Because this was an economic analysis, the goal was not to determine the interest rate at which money could actually be borrowed.[190] The United States, I believe, chose the correct approach, because the question of practicable irrigability turns upon econmic rather than financial feasibility.[191]

2. *Indirect Costs*

The State Parties' discussion on "debt service" also refers to the parties' differences on indirect costs.[192] These costs include such costs as engineering services and contingencies. Both parties have treated these costs as percentages of the capital cost. But they differ over the percentage used, with the United States using a total of 18%[193] and the State Parties using a total of 40%.[194] These gross percentages consist of various

189. Tr. 996-97.
190. *Id.*
191. *See* Part One at III.B. *supra.*
192. State Parties' Post-Trial Opening Brief 66-69 (May 1981).
193. *See* Tr. 497, 601-02; U.S. Exh. 42, app. B.
194. Tr. 3674, 3733; S.P. Exh. 26, at IV-7.

smaller figures where the parties' specific differences appear.

The first component is the engineering fee. The State Parties used an allowance of 15% for this item which covered administration, legal, and engineering services.[195] The cost of engineering service projected by the State Parties, if stated separately, comes to 10% of the total capital cost.[196] The United States used a total figure of 8% for this first component.[197] The State Parties contend that the United States' figure is flawed for two reasons. They first claim that it ignores project administration expenses associated with such matters as minimum wage laws and OSHA regulations.[198] This claim slights the testimony of the United States' expert who merely stated the amount of such work would be small based on his experience on other farming projects.[199] Second, the State Parties claim that the United States should have used an engineering allowance of 10-12% because such a figure would be used on federal reclamation projects.[200] Apparently, they reason again that the proposed irrigation systems must comply with federal standards to be eligible for federal financing.[201] I have already rejected a similar argument because there is no need to meet such conditions.[202] On the whole I find the United States' cost estimates for this item to be reasonable.

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195. Tr. 3674, 3733.

196. Tr. 4146.

197. *See* U.S. Exh. 42, app. B.

198. State Parties' Post-Trial Opening Brief 67 (May 1981).

199. Tr. 497.

200. State Parties' Post-Trial Opening Brief 67-68 (May 1981).

201. *Id.*

202. *See* notes 187-91 and accompanying text *supra*.

The second component consists of contingency expenses and perhaps interest expenses during construction. The State Parties used a 25% figure for this category with 20% attributable solely to contingency.[203] The United States used a 10% figure for contingency costs.[204] Again I believe the United States' estimate to be reasonable. The amount allocated to contingency might easily be lower for the United States because its expert conducted a thorough investigation to reduce the surprises which otherwise would justify a higher contingency factor.[205] The State Parties also very briefly note that the United States' contingency factor is not coupled with an allowance for interest during construction.[206] But they do not provide any support from the record for their assertion that this was an error and thus I am unable to discover which approach is theoretically correct or whether the United States in some manner accounted for this factor elsewhere in its calculations. In sum, I find that the United States' contingency factor is accurate.

Before advancing to another subject, one other comment might be useful. The dispute over the magnitude of indirect costs, particularly the contingency cost

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203. *See* S.P. Exh. 26, at IV-8; Tr. 3733.

204. *See* U.S. Exh. 42, app. B; Tr. 494-96.

205. *See* Tr. 475-80; 3984-86. The State Parties' engineer admitted that these circumstances would justify a lower contingency factor. Tr. 3985. The State Parties note that this witness also stated that engineering costs would increase in order to account for the greater investigation needed to reduce the number of surprises. Tr. 3984. But that investigation was already done for purposes of this litigation and the State Parties do not explain the reason for adding such a cost to this evaluation. Perhaps the State Parties' argument would have had some validity before the investigation was concluded. After the investigation there seems to be no reason for ignoring the knowledge gained from it or allocating its costs to the body of costs considered in this economic feasibility analysis.

206. State Parties' Post-Trial Opening Brief 67 (May 1981).

question, never sufficiently crystallized to the extent that I could ascertain the actual differences between the parties. The parties certainly attached quantitative tags to their positions but much of the evidence simply indicated that each side felt the other was simply too high or too low without accounting for the differences in the nature of the investigation conducted. For example, although the United States' experts conducted a thorough study to justify a lower contingency factor, there is really no evidence regarding how one determines the magnitude of the appropriate reduction.[207] Two experts have given conflicting opinions and there appears to be no precise method of analyzing their differences. In such a situation, I believe the best course is simply to adopt the opinion of the experts who consistently appear to apply the more theoretically correct approach.

3. *Operation, Maintenance, and Replacement Costs*

These parties also differ over operation, maintenance, and replacement costs for the irrigation sys-

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207. In addition I might add an observation that I did not find sufficiently explained in either brief. The United States' indirect costs are computed by multiplying the percentage factors by the total of "on farm costs as well as distribution system costs." This computation necessarily produces a different result than multiplying these factors by the distribution system costs alone as the State Parties have done. *See* U.S. Exh. 42, at 33, app. B; S.P. Exh. 26, at IV-1 to -14. *See also* Tr. 5343-44. This situation was made possible by the different presentation formats adopted by the parties. The United States groups on-farm irrigation costs with those attributable to the distribution system while the State Parties account for those costs as deductions from payment capacity. *See* U.S. Exh. 42, at 33; S.P. Exh. 26, at V-2. Perhaps there is some further explanation for this matter. But in any event this discussion illustrates the problems in simply comparing a 10% figure attributable to contingency with a 20% figure with a similar label.

tems. The State Parties, based on information gathered from managers of irrigation projects and the Water and Power Resources Service, estimated such annual costs at $21 per acre.[208] The United States estimated annual costs to be two percent of the total capital cost of the system.[209] The State Parties criticize the United States' estimate for two reasons.

First, they state that their own costs "represent real data" while the United States' cost figure is "merely a generalized percentage figure."[210] The State Parties, however, indicate no evidence in the record which demonstrates that the United States' method was incorrect or even less preferable than their own. The United States argues that the State Parties never articulated this criticism in the hearings either through cross-examination or the introduction of positive evidence.[211] I find unpersuasive and unfounded

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208. Tr. 3677; S.P. Exh. 26, at IV-13.

209. Tr. 499; U.S. Exh. 42, app. C.

210. State Parties' Post-Trial Opening Brief 70 (May 1981).

211. United States' Post-Trial Closing Brief 31 (June 1981). The United States at this point, *id.* at 31 n.25, also answers the State Parties' argument that the latter's experts have greater experience in water projects and that I should resolve any disagreement in favor of the State Parties. *See* State Parties' Post-Trial Opening Brief 59 n.8 (May 1981). The State Parties claim that their water resource engineers employ as many persons as does the United States' engineering firm which has only one division concentrating on water resources. *Id.* (citing Tr. 70, 2364). In addition, they claim that the United States' expert engineer only cited one project which his firm actually designed. *Id.* (citing Tr. 70). Assuming that such a comparison would yield useful results, the State Parties' representation of the record is misleading. The United States' engineer testified that his firm has "designed a number of irrigation systems which have been built." Tr. 69. He further gave *three* examples of projects designed by his firm under the Small Project Loan Fund. Tr. 69-70. He listed his clients as the "State of Montana, private individuals, the United States, the federal government, irrigation districts and irrigation associations." Tr. 70. He stated that the water resources division of

the State Parties' assertion that their figures represent real data while the United States' figure is only a generalization. Both parties used generalized figures. The State Parties' uniform assumption that these costs would be $21 per acre is hardly a site specific figure. I find this criticism by the State Parties to be without basis.

The State Parties also claim that the United States' operation and maintenance figures are understated because the capital cost per acre used by the United States is understated. This argument, in its general form, can be rejected because I believe the United States' capital cost figures generally to be accurate.

4. *Power and Energy Costs*

The parties have a significant factual dispute over the cost of power needed to pump water to the proposed irrigation units. This dispute consists of two separate disagreements. One concerns the proper power rate and the other concerns the amount of power required.

(a) *Power Rates*

The United States based its calculations on a power rate of 30 mils per kilowatt hour.[212] The State

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his firm employs between 40 to 50 persons in professional and technical positions. *Id.* One of the State Parties' experts testified that the staff of his firm is composed of 40 to 50 persons, over 20 of whom are registered professionals. Tr. 2364. These engineers have been involved with numerous irrigation projects. *See* Tr. 3599-625. Neither group of engineers enjoys an obvious advantage over the other in terms of size, experience or specialization.

212. U.S. Exh. 42, at 34.

Parties used various rates of between 36 and 53 mils (or 3.6 and 5.3 cents) per kilowatt hour,[213] rates which reflect the commercial rates in the separate areas of the five individual Reservations. They claim that the 30 mil rate used by the United States is unrealistically low.[214]

I believe that the United States' estimate is fair and that the State Parties' criticisms are unfounded. The 30 mil power rate resulted from the joint study by the United States' engineers and economist. That study considered various power rates in the vicinity of the Reservations. Among the rates considered were: the 23 or 24 mil rate available to preference power[215] customers such as the Colorado River Indian Reservation, the draft contract rate of 40 mil,[216] proposed in the preference power negotiations underway regarding the Fort Mojave Indian Reservation, and the 28 to 29 mil rate offered as recently as 1979 by Arizona Public Service to water projects with which the economist was associated.[217]

The State Parties raise some questions regarding the accuracy of several aspects of this study. First, they note that the United States' engineer is not an expert on power rates.[218] Second, they point out that the power rate available on the Colorado River Indian Reservation was not shown to be available on the other Reservations. In addition, they state that there was no evidence of the cost of wheeling or transporting

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213. Tr. 3731.
214. State Parties' Post-Trial Opening Brief 71-74 (May 1981).
215. *See* 43 U.S.C. § 485g, h(c) (1976).
216. *See* Tr. 5220.
217. Tr. 502-03, 587-93, 733, 780-81.
218. Tr. 5888.

the power to the Reservations.[219] Some of these same criticisms might also be leveled against the State Parties' experts. In addition, the State Parties do not direct my attention to evidence demonstrating that the United States' expert erred in such particulars as failing to account for the cost of "wheeling" the power. Finally, the availability of a certain power rate at one location does not lose its generally useful value as proof simply because it is not demonstrated to exist at all relevant locations. The goal of the United States' study was to determine a general rate for the lower Colorado River area. The several sources considered by the United States were combined to form an estimate which seems a fair and accurate figure for general use on any of the five Reservations.

More major problems also concern the State Parties. They argue that rates available from preference power sources should not be considered in an economic analysis because such rates are subsidized rates.[220] I agree that subsidies are not appropriate factors in the present economic analysis.[221] On the other hand, I do not agree that these rates are subsidized because such rates fully cover the cost of producing that power.[222] By the testimony of the only professional economist to testify in this case, such an arrangement does not create a subsidy in an economic sense.[223] This preference power is not limited to use by Indian tribes. Munici-

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219. State Parties' Post-Trial Opening Brief 71-72 (May 1981).

220. This conclusion derives from their belief that the preference power rates are not the market rates and hence not sufficiently certain to serve as a basis of an analysis. *See* Tr. 3731-33.

221. *See* Part One at II.B.(1) *supra*.

222. 43 U.S.C. § 485h(c) (1976); Tr. 6055. *See also* Tr. 5503.

223. Tr. 6055-56. He stated that economists sometimes use the term subsidy "loosely" to mean a rate that is less than the market rate. Tr. 6110.

palities and irrigation districts may receive it as well.[224] Beyond that point, the Court of Appeals for the Ninth Circuit has also made it clear that: "The preference clause requires only that public entities be given a preference over private entities in the marketing of power generated by federal reclamation projects."[225] The possibility that the Tribes might receive such power thus seems an appropriate consideration in this analysis. Finally, I should note that the "preference power" rate was merely one of several considered by the United States' experts in estimating an appropriate power rate.[226] Some rates considered were less than and some rates considered were greater than the 30 mil rate eventually adopted.[227] On balance I believe that projection to be reasonable based on all the evidence.

This conclusion is further supported by my perception that the State Parties' estimates bear a fatal flaw. Although both sides have submitted analyses that purport to show revenues and costs relevant for July, 1979,[228] the commercial rate schedules[229] consulted by the State Parties' experts actually reflect rates in effect after rate adjustments in October or November of

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224. Tr. 5493-94.

225. City of Santa Clara v. Andrus, 572 F.2d 660, 667 (9th Cir. 1978). *See also* Arizona Power Pooling Ass'n v. Morton, 527 F.2d 721, 727 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

226. *See* Tr. 502-03, 587-96, 733, 780-81.

227. *See id.*

228. Tr. 503; State Parties' Post-Trial Opening Brief 74 (May 1981). The State Parties' brief actually states that costs should be taken from "mid-1979." *Id.* And their expert merely stated that his power costs were taken from power rates in effect when the United States' data was assembled. Tr. 3977. These statements can only be taken to mean that all parties used the July, 1979 period as the reference point.

229. Tr. 3731.

1979.[230] The State Parties' expert did testify that it was proper to use November, 1979 power costs in an analysis designed to be referenced otherwise to July, 1979.[231] But common sense and persuasive evidence would hold to the contrary. Obviously, costs and revenues should be taken from the same time period.[232] In the context of agricultural needs, power costs should be taken from the growing season,[233] and the greatest power use is in the spring and summer.[234] This consideration is particularly important in light of testimony of the State Parties' expert that the schedule he used reflected a rate increase that took effect in November, 1979.[235] If such increased power rates were considered, the evidence reflects that crop prices also increased in the 1980 season.[236]

For these reasons, I find the United States' position to be more persuasive and believe that its experts did not err in estimating power rates applicable to the economic analysis in this case.

(b) *Power Requirements*

The State Parties contend that the United States' estimates of power cost are low also because in several instances those figures reflect too low an amount of power usage.[237] Two reasons are advanced for such an error. First, on several parcels the United States' esti-

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230. Tr. 5357-60, 3940-44; U.S. Exhs. 97-102.
231. Tr. 5357-59.
232. Tr. 6014-15.
233. *Id.*
234. Tr. 6009-14.
235. Tr. 5357-59.
236. Tr. 6023; U.S. Exh. 147. The evidence shows that these price increases would more than offset any power rate increases. Tr. 6024-25.
237. *See* State Parties' Post-Trial Opening Brief 74-76 (May 1981).

mate allegedly does not provide for sufficient pressure in the proposed sprinkler systems. On those units the United States' estimated annual power cost has been increased by $7 per acre by the State Parties.[238] In addition, on one unit, FM-3, the State Parties contend that the United States underestimated the power required to lift water to the height of the unit's land. This adjustment resulted in an annual power cost increase of approximately $27 per acre.[239] Neither criticism is persuasive.

The first issue, regarding sprinkler system pressure, appears to be a fairly close question. The United States utilized a general case estimate of pressure of 15 pounds per square inch (psi) for its sprinkler projections.[240] The State Parties' experts and the Tribes' experts estimated sprinkler costs based on 40 to 80 psi.[241] The United States' expert recognized that even among low pressure systems his projected sprinkler pressure was low. He described center pivot sprinkler systems with 40 psi at the pivot and 10 psi at "the end of the sprinkler arm."[242] His projection in his center pivot general cost estimate for 15 psi "at the end of a 300 foot long line and at the pivot bar"[243] was obviously at the low end of that range. But the United States' expert was aware that he had chosen a low figure which he felt after investigation was well-suited for the lands under consideration.[244]

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238. *See* S.P. Exh. 154. The units concerned are FM-2, FM-3, FM-5, FM-6, FM-7, FM-11, Calada, CH-3, and CH-4.

239. *See* S.P. Exh. 154.

240. Tr. 613-14.

241. *See* Tr. 5214; F.M. Exh. 2, app. C; C.R. Exh. 1, app. B.

242. *See* Tr. 5666-68.

243. *See* Tr. 5731.

244. *See* Tr. 5663-74.

The State Parties presented potentially convincing evidence showing that the 15 psi figure was entirely unrealistic. Their expert testified that his research showed that 30 psi was the absolute minimum feasible pressure at the pivot for a center pivot sprinkler system and that more pressure would actually be needed to "get out to the pivot."[245] If this testimony had remained firm it might have been convincing, given that the United States' expert was obviously basing his estimates on a minimum pressure. Instead, the State Parties' expert later gave further testimony showing that his earlier representations of his study on pressure were incorrect and misleading. In this later testimony, he revealed that his information source had stated that the minimum acceptable pressure "at the end of the pipe" would be 10 psi and the notes he used in his testimony revealed that the 30 psi figure represented a "typical" pressure at pivot rather than a minimum.[246] He thus admitted that there is a range of possible sprinkler pressures.[247]

This state of the evidence leaves the factfinder in something of a dilemma. On the one hand the United States' expert used a low pressure estimate of 15 psi at the pivot while existing sprinkler systems can use as low as 10 psi at the end of the sprinkler arm. Obviously, the pressure is to some extent lost in between the pivot and the end of the sprinkler arm,[248] but neither side has directed my attention to any evidence showing the method for translating pressure at the pivot into pressure at the end of the arm. On the other hand, the State Parties' expert does not appear to be

245. Tr. 5214-15.
246. *See* Tr. 5331-34; U.S. Exh. 104.
247. *See* Tr. 5334.
248. *See* Tr. 5669 (United States' expert).

particularly reliable on this issue. Under these circumstances, I find the United States' expert to be more credible. The United States has the burden of proof on this issue and introduced competent evidence supporting its position. Some of the links in the rationale behind its position do not appear in my review of the testimony. But the conclusions were offered by an expert witness whose testimony was never revealed to be seriously in error or misleading. His opinion appears to be the more sound.

In addition to the debate over the theoretical minimum sprinkler pressure, the United States introduced several exhibits demonstrating that when a specific estimate is performed on the disputed parcels, the costs are not significantly increased even if a higher sprinkler pressure is assumed.[249] These exhibits and the accompanying testimony do not represent some form of correction of the general case analysis in light of the State Parties' criticisms. Rather, they are earlier confirmations of the validity of the general case used by the United States' engineers.[250] But the only fair approach would be to adopt the specific cost estimates as overriding the cost figures assumed in the general case.[251]

The last issue concerns only Unit FM-3 on the Fort Mojave Reservation. The State Parties claim that insufficient power was included in the general case esti-

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249. *See* U.S. Exhs. 132, 133, 134, 137, 138, 140. The annual costs for FM-7 were significantly less in this specific estimate than in the general case analysis. *See* U.S. Exh. 138; U.S. Exh. 60, at 18. *See also* Tr. 5767-69.

250. Tr. 5723-75. *See* U.S. Exhs. 132, 133, 134, 137, 138, 140.

251. *See* U.S. Exhs. 42, 60. In one case, FM-7, the annual costs decreased significantly in the specific analysis such that its annual benefits are greater than its annual costs. *See* U.S. Exh. 138; U.S. Exh. 60, at 18.

mate to raise water to this more highly elevated unit. The State Parties thus estimate that $27 annual cost per acre should be added to the annual cost of serving this unit.[252] This conclusion is unfounded. The original estimate by the United States was a general case estimate for this parcel. If the State Parties sought to demonstrate how this parcel differs from the general case, they should have accounted for all such differences. As the United States' expert testified, his general case estimate for this parcel was confirmed in his trial preparation work with a specific estimate.[253] In that estimate he calculated that his general estimate understated annual costs by only $2 per acre when all differences from the general case are considered.[254] This evidence convinces me that the United States did not significantly understate the annual power costs on FM-3.

In sum, I find the United States' evidence regarding power requirements to be persuasive.

F. *Size of Irrigation Units as Claimed and as Proved*

The engineering expert for the United States gave rather lengthy rebuttal testimony regarding specific confirmation estimates on several parcels for which he had projected a general case system.[255] In such testimony he described his conclusions based on the system outlined in the several exhibits that were then introduced.[256] These exhibits frequently outlined systems containing acreage in amounts different from

252. *See* S.P. Exhs. 154, 155.
253. Tr. 5746-48; U.S. Exh. 133.
254. *See* Tr. 5747-48.
255. Tr. 5731-75.
256. *See* U.S. Exhs. 132, 133, 134, 137, 138, 140, 142, 145.

those claimed. The State Parties contend that the United States claims should be adjusted accordingly in a finding of practicable irrigability.[257] The United States disagrees.

The most prevalent concern articulated by the State Parties regarding these units involves those units where the United States' specific estimate was planned for less acreage than was claimed.[258] They state that there was no showing by the United States that the remaining acres could receive water service and that the claims should be reduced by that amount.[259] This rather remarkable line of thought completely ignores the explanation for this "discrepancy" that was elicited by the counsel for the State of Nevada. The United States' expert explained thoroughly that his specific estimates included a given number of acres and the remaining acres of the claimed area would be serviced by equipment to reach the ostensibly uncovered areas of the unit, also known as the "corners" of the field.[260] This is apparently a common procedure and the United States' expert testified that it would not increase the cost per acre because as total costs would rise so also would the total number of areas served.[261] Contrary to the State Parties' contentions, the United States' position is not unsupported by the evidence. Instead, it is the State Parties who do not

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257. *See* State Parties' Post-Trial Opening Brief 69-70, a-5, -7, -8, -10, -13, -35, -39 (May 1981). The parcels concerned are FM-2, FM-3, FM-5, FM-6, Quail Hollow, FY-2, and FY-8. *See* U.S. Exhs. 132, 133, 134, 137, 138, 140, 142, 145.

258. *See* U.S. Exhs. 42, 132, 133, 134, 135, 142, 145.

259. *See, e.g.*, State Parties' Post-Trial Opening Brief a-5 (May 1981).

260. Tr. 5904-08. The plans for FM-7 specifically note that systems with "corner watering equipment" would be used. U.S. Exh. 138, at 3.

261. *See* Tr. 5905-06.

cite any evidence demonstrating that the system envisioned by the United States' expert is infeasible.

The other concern by the State Parties relates only to one parcel, Quail Hollow. The United States' projection for this parcel is a 125-acre design for the 95 acres claimed.[262] The United States' engineer confirmed this fact when he testified about the specific design for the parcel.[263] The State Parties claim that the per acre cost of irrigating this unit is distorted because total costs were divided by the higher figure of 125 acres rather than the lower claimed figure of 95 acres.[264] The United States simply states, without offering any support from the record, that the per acre cost would not change even if a larger unit design was used to determine the cost of serving a smaller number of claimed acres.[265]

Without any evidence in the record supporting the United States' position on this issue, I must agree with the State Parties' position. If the unit size is reduced, obviously the total costs will also be reduced to some extent. The United States is correct up to that point. The difficulty comes from the lack of evidence that

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262. *See* U.S. Exh. 42, app. B.

263. *See* Tr. 5775-79; U.S. Exh. 140.

264. State Parties' Post-Trial Opening Brief a-13 (May 1981); *see also id.* at 69-70. This same argument might be relevant with regard to FM-7. The United States introduced a claim for 583 acres. *See* U.S. Exh. 42, Table 7. On the other hand, the United States introduced a specific design of an irrigation system to serve this unit and the design called for a 980-acre system. *See* U.S. Exh. 138. This issue does not merit the same consideration given the issue regarding the Quail Hollow Unit for two reasons. First, the State Parties in their discussion of FM-7 do not raise this point. *See* State Parties' Post-Trial Opening Brief a-11 (May 1981). Second, the 980-acre design also included some lands covered by the 1964 Decree and, thus, the per acre cost is very possibly perfectly correct. U.S. Exh. 138, at 3.

265. United States' Post-Trial Closing Brief 32-33 (June 1981).

there are no economies of scale with respect to this unit. Obviously, some variable costs and even some capital costs will decrease in such a way that per acre costs would not increase to that extent. But I cannot find that all costs would decrease at the same rate, if at all. For example, the design for this unit specified two pumps costing $21,000. For the cost per acre to remain the same after the reduction in the unit's size from 125 to 95 acres, all revised costs must be no greater than 76% (95/125) of the original higher costs. Yet the United States does not indicate if such smaller pumps costing only that amount can be obtained and would adequately serve the unit. This matter is crucially important because of the United States' estimate that annual benefits exceed annual costs by only one dollar. If the cost of these pumps fails by only a small amount to decrease in a direct proportion with the number of acres served, then costs will exceed benefits without considering the behavior of any other costs. I conclude that the 95 acres in the Quail Hollow Unit have not been proven to be practicably irrigable.

The United States claimed this parcel could be feasibly irrigated. A showing that a greater-sized parcel can be irrigated does not prove the point in issue because not all costs will necessarily vary in direct proportion to the size of the parcel. If the United States had called my attention to any evidence showing that all costs would vary directly with the acreage farmed, after the State Parties raised the point in their brief, I might have concluded that the United States proved its point. Instead, the initial evidence offered by the United States[266] and the confirmation calculations[267]

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266. *See* U.S. Exh. 42, app. B.
267. *See* U.S. Exh. 140.

show only that a 125-acre parcel would have a particular annual cost. There is really no evidence that a 95-acre parcel could be farmed at that same per acre cost, except for the United States' engineer's adoption, for the 95-acre unit, of the figure based on a 125-acre parcel. Where the benefits only barely exceed costs, I am persuaded that economies of scale would apply to this marginal situation and thus I do not find it feasible in the absence of specific proof to the contrary.

Other than the claim for the Calada Unit, I believe that the United States adequately proved that the irrigation units as sized in its expert report can be feasibly irrigated.

G. *Nevada's Claim Regarding Use of Wells*

One combined issue of law and fact is raised by the State of Nevada touching upon the United States' claim of practicable irrigability of the area known as FM-3. This is an area of 180 acres in the most northwesterly portion of the Fort Mojave Reservation within the State of Nevada. It lies west, at a distance of less than 1,000 feet, from the northwestern boundary of lands already found by the Court's 1964 Decree to be practicably irrigable.[268]

This issue was raised by Nevada's contention that the evidence of irrigability introduced by the United States requires that I hold that: irrigation is to be supplied on this tract from wells; that the Court's earlier Decree has established that it intended to include as practicably irrigable acres only those lands which would receive their water from the mainstream of the River; and that there was a failure of proof by the

268. This information is apparent from a review of the map attached to U.S. Exh. 42.

United States and Tribes that the ground water produced from the wells in the area would be part of the mainstream water.[269]

The first comment on this criticism of the Government's proof is that the claim of irrigability of FM-3 is not necessarily based on the use of wells. The HKM Report, introduced by the United States and received per stipulation on the third day of oral testimony, states with respect to these lands: "Could either use wells or incorporate [the unit] in lands previously determined to be irrigable."[270] The annual cost of providing water service on these lands is given as $130 per acre without reference to whether the water is to come from wells or from an extension of another system. Thus, it is clear that if connection with an irrigation system designed for the closely adjacent lands (already found by the Court's 1964 Decree to be irrigable) is possible within the economic standards discussed elsewhere, it makes no difference whether wells that might be devised on that land would be supplied by aquifers deriving water from the River or by some other source of groundwater.

The second comment on Nevada's contention is that I find substantial evidence in the record to support the claim of the United States that the well water is from the mainstream of the River. This finding disposes of Nevada's entire argument. As noted, the HKM Report, the basis of the Government's claim for these lands, was admitted in evidence the third day of the trial. Mr. Al Kersich, the qualified witness who was responsible for the Report, testified in support of his

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269. Trial Brief of the State of Nevada on Proposed Ground Water Use (May 1981).

270. U.S. Exh. 42, at 43.

report. He limited his oral testimony generally to matters that were put in issue by one or all of the State Parties. No party at that time raised the novel claim that Nevada made for the first time during the Government's rebuttal evidence some six months later. The HKM Report, which is considered by me in the same light as I would consider oral opinion evidence, stated as follows:

> The groundwater potential is described in Geological Survey Professional Paper 486-J "Geohydrology of the Needles Area, Arizona, California and Nevada". Most of the Fort Mojave Indian Reservation is underlain by thick deposits of alluvial sands, gravel and silt. Where the gravels exist, the aquifer will yield large amounts of water and the sand will yield moderate supplies. The groundwater system is hydraulically connected to the Colorado River; irrigation return flows to the Colorado River are the primary source of recharge. When the area to be irrigated is a considerable distance from the river or not close to the source of any existing irrigation supply system, groundwater may be utilized as an alternate source of supply for irrigation.[271]

The witness was available for cross-examination on any matters dealt with in the Report, but, until the rebuttal stage of the case, Nevada did not seek to question this statement which it now says is too general for me to accept. This complaint comes too late.[272]

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271. *Id.* at 20.

272. It is not correct, as Nevada now claims, that the question of the use of wells surfaced for the first time during the rebuttal period. As the above recitation shows, it was presented as an alternative basis of the claim for FM-3 from the very start of the case.

Nevada also seeks to support its contention of lack of evidence of the connection of any prospective wells with the River by pointing to cross-examination of Kersich, six months later, when he testified in rebuttal of the State Parties' case. He testified that the elevation of such a well would be 600 feet; that the elevation of the River was 484 feet; that some water would be found at 75 feet down; but, that the planned well would take water from a 450 foot elevation.[273] Thus, the source of the water would be some 34 feet below the River. I find that his testimony that this water would be mainstream water was correct.

H. *Miscellaneous Problems Associated with Individual Parcels*

In addition to the concerns which apply to a large number of irrigation units, the State Parties raise a number of concerns that each relate to only one or two parcels claimed by the United States.[274] These matters are discussed in the parties' briefs along with the attributes of each individual disputed parcel. The general concerns also raised in those portions of the briefs are adequately addressed elsewhere, and only limited matters merit further discussion at this point.

First, the State Parties claim that an area of 42 gross acres of Unit WC-2 on the Cocopah Indian Res-

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273. Tr. 5912-14.

274. The State Parties do not raise any significant individualized concerns with respect to the Tribes' claims. The only possibility is the isolated criticism of the Tribes' estimated water costs relating to Unit CH-100 on the Chemehuevi Reservation and the Calada Unit on the Fort Mojave Reservation. State Parties' Post-Trial Opening Brief a-15, a-28 (May 1981). These statements fail to show that the State Parties' experts prepared evidence demonstrating that the Tribes' experts erred in this regard.

ervation "appears" to encroach on the channel of the Colorado River.[275] The United States' engineering expert stated that this assertion was not true and that through the use of aerial photography he had taken particular care to avoid such a problem by restricting this unit's boundary to the land where surface vegetation existed along the River.[276] On this issue, I find the position of the United States to be well-supported and convincing when compared to the rather tentative contrary evidence.

Regarding Unit FY-7 on the Fort Yuma Indian Reservation the State Parties claim that the United States included a seven-acre lake within this parcel.[277] The United States answered with expert testimony that the lake was not within the measured acreage.[278] That answer, I find, is sufficient.

With respect to two parcels the State Parties argue that the United States' agricultural economist used too high a payment capacity because certain small portions of those units have sandy soils.[279] The answer to the assertion regarding FM-11 on the Fort Mojave Indian Reservation is simple because I have earlier found that no such lands exist on this parcel based on my

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275. S.P. Exh. 158 BB; State Parties' Post-Trial Opening Brief a-34 (May 1981).

276. Tr. 5794-98; U.S. Exh. 141.

277. S.P. Exh. 158 FF; State Parties' Post-Trial Opening Brief a-38 (May 1981).

278. Tr. 5816-18; U.S. Exh. 144. The United States' expert testified that a one-acre pond was within the parcel's measured acreage, but that this pond fit within the 4% of the tract not planned for direct cultivation. Either that statement is true or this one-acre matter is de minimis because the State Parties do not discuss the matter in their brief.

279. State Parties' Post-Trial Opening Brief a-12, -33 (May 1981). The Tribe no longer asserts a claim for FM-201. F.M. Supp. Exh. (Sept. 1981), record item no. 192. *See also* S.P. Exhs. 110, 158G, 158AA.

general adoption of the analysis of the United States' soils expert.[280] The claim in the State Parties' brief regarding Unit EC-1 on the Cocopah Reservation is unaccompanied by any reference to evidence indicating that nine acres of sandy lands in an 81-acre parcel make appropriate a different payment capacity than the one used by the United States' expert. That expert specifically examined each parcel[281] before projecting a payment capacity for each parcel.[282] Given this background, I find the State Parties' position to be misguided.

Regarding the United States' claims on the Fort Yuma Indian Reservation, the State Parties assert that three parcels (FY-4, FY-10, and FY-11) are, at least in part, too small, irregular, or isolated to cultivate.[283] I find that with respect to these parcels the United States' engineering expert correctly stated that this issue is essentially a matter of judgment where a specific cost per acre cannot definitely be estimated.[284] Furthermore, I find that he correctly stated that over time such parcels would be cultivated.

Next, with respect to Unit CH-3 on the Chemehuevi Indian Reservation, the State Parties raise a question with potentially broader significance. They note that the "unit water costs . . . were based on a 185-acre service area which if scaled down to serve only the arable portion of the parcel would increase significantly."[285] This argument, made without

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280. U.S. Exh. 3. *See* Tr. 5775.

281. Tr. 764.

282. U.S. Exh. 60.

283. S.P. Exhs. 158 EE, 158 II, 158 KK. *See* State Parties' Post-Trial Opening Brief a-37, -41, -42 (May 1981).

284. Tr. 520, 5809-10, 5820-22.

285. State Parties' Post-Trial Opening Brief a-26 (May 1981).

reference to any record evidence, would logically apply to all parcels with varying degrees of significance depending upon the amount of non-arable inclusions in any particular irrigation unit and if followed would result in the exclusion of all acreage on such parcels when such higher costs exceed the benefits of farming the parcel. On the other hand, there is no justification for consideration of such higher costs, because the United States argues that although its soils expert considers this land to be so poor as to be classified as "non-irrigable," the land can be improved to the extent that it would be more profitable to cultivate the land than to exclude it from the irrigation units.[286] Thus, this question is not one involving a difference between the size of the irrigation units as claimed and as proved. I find that the United States' explanation resolves persuasively this issue. The State Parties' arguments regarding the inappropriateness of awarding water rights to non-arable or non-irrigable land has been accepted. The State Parties do not, then, undertake to inform me of any rational means related to record evidence which indicates at what point farming of an entire unit may be rendered infeasible because of a too-high percentage of non-arable land. I believe that I should not perform such analysis on an ad hoc basis and, thus, find the United States' position more tenable.

The State Parties also note a potential problem with the United States' cost calculations on CH-4 on

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286. *See, e.g.*, Tr. 793-94, 972, 5782-84. *See also* Tr. 3480. Because the United States' agricultural economist had studied the productivity of lands with similar non-arable inclusions, his payment capacity analyses already accounted for this effect. *See* Tr. 901-03, 5995-97. But I was unpersuaded that water rights should be given to land which the soils expert had classified as non-irrigable.

the Chemehuevi Indian Reservation.[287] They claim that the United States has understated power costs for pumping water to this parcel by averaging those costs with the costs associated with pumping water to the adjoining and lower-lying decreed lands which are yet undeveloped. The particular costs of pumping to CH-4 is, according to the State Parties' expert, $12 per acre more than the average cost of serving the entire unit including CH-4 and the decreed lands.[288] This argument is unpersuasive, because it gives a misleading view of the marginal cost of including the additional lands of CH-4 within a unit that also includes the decreed lands which do not yet have water service. The State Parties' expert admitted on cross-examination that the average costs would decrease because of economies of scale when the larger unit (including CH-4) is considered as opposed to a unit consisting only of decreed lands.[289] But the State Parties' expert made no attempt to determine the economies of scale for the entire cost structure of serving this area.[290] The United States' expert, on the other hand, acknowledged that pumping costs would be greater for CH-4, but stated that the overall effect of economies of scale on other costs would offset the increase in pumping costs.[291] I find that the State Parties' criticism is unwarranted and should not be considered in an analysis of practicable irrigability.

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287. State Parties' Post-Trial Opening Brief a-27 (May 1981).

288. Tr. 5210-12; S.P. Exh. 154.

289. Tr. 5350-55.

290. *Id.*

291. Tr. 5785-90. His opinion was quantified in part for illustrative purposes.

I. *Conclusions Regarding the Practicable Irrigability of Lands in the United States Claims*

The United States claims may be sustained upon a comparison of economic costs and benefits for the irrigable lands in the designated irrigation units for which the United States has made an adequate showing of both costs and benefits.

In table form these claims for the Fort Mojave Indian Reservations are:

Unit	Land Type	Annual Water Costs (per acre)	Annual Benefits (per acre)	Gross Acres
FM-2	Arizona Omitted	$130	$140	488
FM-3	Nevada Omitted	$130	$149	180
FM-4	Nevada Omitted	$178	$185	2
	California Omitted	$178	$185	15
FM-5	Arizona Omitted	$130	$149	898
FM-6	California Omitted	$130	$140	308
FM-7	Arizona Omitted	$134[292]	$140	583
FM-8	California Boundary	$178	$185	13
FM-9	California Boundary	$178	$185	1,848
FM-10	Arizona Boundary	$140	$185	514
FM-11	Arizona Boundary	$140	$185	137
FM-12	Arizona Boundary	$178	$185	151
FM-13	Arizona Omitted Arizona	$178	$185	160

292. *See* U.S. Exh. 138; Tr. 5768-69.

	Boundary	$178	$185	442
Calada	Arizona Omitted	$136	$149	756
		Totals		6,495[293]

Totals	Gross Acres
Arizona Omitted	2,885
Arizona Boundary	1,244
California Omitted	323
California Boundary	1,861
Nevada Omitted	182
	6,495

Of this total, 1,075 gross acres lie in areas of indefinite boundaries and may not receive water rights.[294] The reduced totals are:

Arizona Omitted	2,767
Arizona Boundary	487
California Omitted	123
California Boundary	1,861
Nevada Omitted	182
	5,420

Within this reduced total there exist 776 gross non-irrigable acres,[295] thus, leaving 4,644 practicably irrigable gross acres. The annual water rights to be added to this Reservation may thus be computed:

4,644 x .95 = 4,412 net irrigable acres

4,412 x 6.46 A.F./acre = 28,502 acre-feet

In table form the water rights claims for the Fort Yuma Indian Reservation are:

Unit	Land Type	Annual Water Costs (per acre)	Annual Benefits (per acre)	Gross Acres
FY-1	California Boundary	$178	$280	41
FY-2	California			

293. *See* U.S. Exh. 42, Table 7; U.S. Exh. 60, at 18.
294. *See* S.P. Exh. 160.
295. *See* U.S. Exh. 3.

	Boundary	$194	$220[296]		75
FY-3	California Boundary	$178	$280		202
FY-4	California Omitted	$178	$280		216
	California Boundary	$178	$280		550
FY-5	California Boundary	$178	$280		400
FY-6	California Boundary	$178	$220		455
FY-7	California Boundary	$178	$220		807
	Arizona Boundary	$178	$220		335
FY-8	California Boundary	$140	$220		28
	Arizona Boundary	$140	$220		631
FY-9	California Boundary	$178	$248		649
	Arizona Boundary	$178	$248		551
FY-10	California Boundary	$194	$280		19
FY-11	California Boundary	$198	$280		831
FY-12	California Boundary	$194	$220		160
				Total	5,950[297]

Totals	Gross Acres
California Omitted	216
California Boundary	4,217
Arizona Boundary	1,517
	5,950

296. *See* Tr. 977-79, 2293-94, 6038-43.

297. U.S. Exh. 42, Table 10; U.S. Exh. 60, at 18-19. *See* State Parties' Post-Trial Closing Brief 7-13 (June 1981); Letter to all parties (Sept. 8, 1981), record item no. 182; Letter from Scott McElroy (Sept. 28, 1981), record item no. 188.

Of this total, there are 84 non-irrigable gross acres.[298] This consideration leaves 5,866 practicably irrigable gross acres. The annual water rights to be added to this Reservation may thus be computed:

5,866 x .95 = 5,573 net irrigable acres

5,573 x 6.67 = 37,172 acre-feet

In table form the water rights claims for the Chemehuevi Indian Reservation are:

Unit	Land Type	Annual Water Cost (per acre)	Annual Benefits (per acre)	Gross Acres
CH-3	California Omitted	$108	$179	185
CH-4	California Omitted	$172	$179	1,230
				1,415[299]

Of this total, 329 gross acres are non-irrigable.[300] Thus, there are 1,086 practicably irrigable gross acres on this Reservation. The annual water rights to be added to this Reservation may be computed as:

1,086 x .95 = 1,032 net irrigable acres

1,032 x 5.97 = 6,161 acre-feet

In table form the water rights claims for the Cocopah Indian Reservation are:

Unit	Land Type	Annual Water Cost (per acre)	Annual Benefits (per acre)	Gross Acres
WC-1	Arizona Boundary	$178	$202	465
WC-2	Arizona Boundary	$178	$202	696
EC-1	Arizona Omitted	$194	$202	81
				1,242[301]

298. U.S. Exh. 14.
299. U.S. Exh. 42, Table 9; U.S. Exh. 60, at 18.
300. U.S. Exh. 6.
301. U.S. Exh. 42, Table 9; U.S. Exh. 60, at 19.

Of this total there are 10 non-irrigable gross acres in EC-1.[302] Thus, there are 1,232 gross irrigable acres on this Reservation. The annual water rights to be added to this Reservation may be computed as:

1,232 x .95 = 1,170 net irrigable acres

1,170 x 6.37 = 7,453 acre-feet

The United States claims on the Colorado River Indian Reservation are subject to a stipulation. The gross irrigable acreage on that Reservation is stipulated to be:

Land Type	Gross Acres
Arizona Omitted	16,180.5
California Omitted	1,853.5
California Boundary	3,600
	21,634[303]

The additional net irrigable acres are:

21,634 x .95 = 20,552 net irrigable acres

But that increase must be partially offset by a correction of 218 net acres, giving a total of 20,334 net irrigable acres. The annual water rights to be added are 135,628 acre-feet in diversion (20,334 x 6.67 (A.F./ac.)).

Thus the following represent the successful United States claims for the five Reservations:

Reservation	Net Irrigable Acres		Unit Diversion Quantity (A.F./ac.)		Annual Diversion Right
Ft. Mojave	4,412	x	6.46	=	28,502
Ft. Yuma	5,573	x	6.67	=	37,172
Chemehuevi	1,032	x	5.97	=	6,161
Cocopah	1,170	x	6.37	=	7,453
Colorado River	20,334	x	6.67	=	135,628

The 1964 Decree should be modified accordingly.

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302. *See* U.S. Exh. 17.

303. Stipulation of September 8, 1980, record item no. 91.

II. Claims Asserted by the Indian Tribes

The State Parties dispute almost all the acreage claimed separately by the Tribes to be practicably irrigable. The nature of this dispute differs somewhat from that regarding the United States claims. Although a similar soils dispute is involved, the primary issue concerns the suitability of the permanent crops projected by the Tribes for the Reservation lands. In this regard the dispute centers over the correctness of the prices and yields used by the Tribes' experts.[1] On the other hand, the off-farm water delivery costs[2] and the production costs[3] used by the Tribes' experts were generally unrebutted by any specific evidence.[4] The primary issue that is dispostitive of most of the Tribes' claims is crop suitability.

A. Crop Suitability

The question of crop suitability becomes relevant because of the lack of large-scale, long-term, commercial production in the lower Colorado River Valley of any of the four permanent crops projected by the Tribes' experts. Those crops, as projected by the experts of the Fort Mojave, Chemeheuvi, and Colorado River Tribes, are pistachios, almonds, figs, and table grapes. The Quechan Tribe produced evidence relating to many crops, but placed a special emphasis on grapes. Only grapes have a tangible history of produc-

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1. *See* State Parties' Post-Trial Opening Brief 77-80 (May 1981).
2. Tr. 5430.
3. Tr. 4009.
4. The State Parties later challenged some of the Quechan Tribe's expert evidence regarding the cost per acre calculations for the water delivery system designed for that Reservation. *See* notes 197-220 and accompanying text *infra*. *See also* Tr. 5462.

tion in the immediate vicinity of any of the Reservations, and even that history is not very extensive. Contrary to the State Parties' argument, I believe that I should not strike the possibility of successful production of permanent crops on the Reservations simply because of a lack of historical production of such crops in the area. In many regions new and untested crops have been introduced upon the advice of experts of the sort who counsel the parties in this case. The proper course, I believe, is to weigh the various opinions regarding the positive and negative factors with respect to each particular crop.

1. Pistachios

The primary question regarding the suitability of pistachios to the lower Colorado River Valley concerns the sufficiency of the number of "chilling hours" in the winter months. In order for the pistachio trees to produce an acceptable yield, the trees must receive in the months of November to March, a necessary amount of hours of weather in temperatures of less than 45° F.[5] The parties raise numerous sub-issues such as whether it is proper to subtract those hours in November to March when the temperature exceeds a certain temperature such as 70° F.[6] Resolution of these minor disputes is unnecessary here because I believe that the Tribes claims must fail on the more fundamental issue regarding the proper range of chilling hours necessary for the growing of a commercial pistachio crop.

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5. *See* Tr. 936, 1224, 3739-40, 3742-43, 4029, 4359, 4558, 4580-81, 4632-33, 6923.

6. Tr. 3740-49, 4089-92, 4416-22; C.R. Exh. 9, 28, 30. *See also* 4039, 4567, 4633-34, 4672-76, 4709-10, 4852-56. *Compare* Tr. 6299-301, 6316-17, 6918-28, 6935-36, 6997, 7016; S.P. Exh. 167; C.R. Exh. 37.

At the outset, I recognize that this issue represents an uncertain question. The farming of pistachios represents a new proposition for American agriculturists, and as stated by one of the Tribes' experts, the best estimates regarding the requisite chilling hours generally are given in a broad range with perhaps two or three hundred hours difference between the minimum and maximum ends of that range.[7] The Tribes assert that a minimum of 600 chilling hours in the winter months is sufficient for the growing of pistachios.[8] They contend that this assertion is bolstered by evidence that the same number of chilling hours occurs in the winter months at Parker, Arizona (Colorado River Indian Reservation) as in the vicinity of Bakersfield, California (the location of Superior Farms pistachio groves).[9] This evidence simply fails to convince me when the evidence to the contrary is considered.

The Tribes' evidence as just discussed was first introduced in the rebuttal phase of the Tribes' case. The principal witness for the Tribes testified unequivocally that between 850 to 950 chilling hours were required for the growing of pistachios.[10] This estimate orginally confirmed the State Parties' estimate that 800 to 1,000 chilling hours were required.[11] The rebuttal testimony, that 600 chilling hours is sufficient, entered the case only after the Tribes realized that their estimate of the number of chilling hours was flawed for the lands in question. The estimate was originally taken from data

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7. Tr. 6931-38, 6971-79.

8. Tr. 6931.

9. C.R. Exh. 37; Tr. 4555. *See also* Tr. 4760.

10. Tr. 1069, 1224, 1265. The United States' expert also testified that 1,000 chilling hours are required to grow pistachios. Tr. 936.

11. Tr. 3740-43, 4088-94.

measured at Poston, Arizona rather than Parker,[12] a distinction which is significant because Poston in the valley can expect nearly 400 more chilling hours than Parker on the mesa.[13] Upon reflection the Tribes have acknowledged that, although Poston may average 1,028 chilling hours annually, Parker may expect only 631 chilling hours annually.[14] The Tribes' conclusion, that pistachios may yield an acceptable crop on these Reservations, remains unchanged only because they produced a rebuttal witness who testified that 600 chilling hours represents a minimum figure, in contrast to the Tribes' previous witness.[15]

This sequence of events fully convinces me that the range for acceptable commercial growth of pistachios extends approximately from 800 chilling hours to 1,000 chilling hours. The Tribes' rebuttal witness certainly presented substantial evidence supporting a lower figure, but when all the evidence is considered, the higher figures appear more correct. Numerous sources other than the State Parties' experts confirm that this higher estimate is needed for a good crop.[16] Considering this evidence, in addition to the State Parties' proof, I find that pistachios cannot be feasibly grown in the Reservation areas projected by the Tribes.

Several minor points might bear some discussion in relation to this issue. First, the Tribes claim that the number of chilling hours at Parker is nearly identical

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12. Tr. 1224-25; F.M. Exh. 2, at 15; C.R. Exh. 1, at 13.

13. Tr. 3746-51, 5035-36, 6264, 6564-65; S.P. Exh. 118.

14. C.R. Exh. 37.

15. I recognize the Tribes' claim that the previous witness was not an expert in this specific area. *See, e.g.*, Tr. 1226. But such an argument aids the Tribes very little because that first witness purported to offer the collective professional judgment of his engineering firm on a variety of subjects which undoubtedly exceeded his personal expertise.

16. *See* Tr. 936, 1069, 1224, 1265; C.R. Exhs. 15, 27, 30.

to the number at Bakersfield.[17] If the pistachio trees yield good crops at Bakersfield, any location having the same chilling hours as Bakersfield, ought, barring any further difficulties, to have sufficient chilling hours. But I question the accuracy of the Tribes' evidence on this point. The records for Superior Farms near Bakersfield indicate that for the crop years 1977 to 1979 the chilling hours annually totalled between 694 and 1,233.[18] In the year (1977-78) having the lowest number of chilling hours (694), the farm suffered a decrease in yield amounting to 25 to 35%.[19] Such facts belie the accuracy of the average figure of 629 chilling hours for the Bakersfield pistachio growing area.

Without question there is evidence in the record indicating a lower minimum number of chilling hours for pistachos. One expert estimated 400 to 500 hours constituted the minimum range.[20] But that same expert indicated that 800 chilling hours were required for a good year[21] and that he believed the Colorado River area to have less than the 400 hour minimum.[22] This background indicates that when the State Parties' chief expert witness on the subject stated that 600 chilling hours was a minimum figure, he meant that it was a minimum before any appreciable crop would be produced.[23]

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17. *See* C.R. Exh. 37.

18. *See* S.P. Exh. 126. The 1980 figures were not considered here because this collection of data was terminated at an early stage in that year. Tr. 4838-40.

19. *See* Tr. 4568-69, 4579-80, 4836-44.

20. *See* C.R. Exh. 16; Tr. 4424.

21. C.R. Exh. 30.

22. C.R. Exh. 16.

23. *See* Tr. 4561, 4632.

One final matter remains. The Fort Mojave Tribe asserts that the 490 hour figure indicated for Needles[24] should be adjusted upwards because this data was recorded on mesa land and the pistachios will be planted on valley lands.[25] This conclusion stems from expert testimony that the valley lands would have substantially higher chilling hours than shown for Needles and that the effect would be similar to that noticed between Poston and Parker.[26] A careful reading of the transcript reveals, however, that this expert's opinion does not extend to projecting sufficient chilling hours measured either by the Tribes' asserted minimum or the minimum which I find correct. That witness, instead, stated that he could not estimate the specific magnitude of the expected increase in the Fort Mojave valley lands because he lacked "sufficient data to make such a calculation."[27] Without that data, the best he could state was that "there could be a significant difference in chilling" between Needles and the valley lands but he was not certain enough to project the magnitude of the difference.[28] If the Tribe's expert cannot undertake such a task, I cannot make such a projection. Given the importance of this issue, the Fort Mojave Tribe should have provided the evidence sufficient to make a reasonably quantified projection such that firm conclusions would be possible. With only generalities in evidence on an issue which was specifically and vigorously debated, the Tribe's evidence simply fails to prove sufficiently this part of their case.

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24. *See* C.R. Exh. 37.
25. Four Tribes' Opening Post-Trial Brief 63 n.* (May 1981).
26. *See* Tr. 6276-78; C.R. Exh. 37.
27. Tr. 6265-66.
28. *Id.*

Given my conclusion that approximately 800 to 1,000 chilling hours are required to grow pistachios, I need not analyze the specific effect of the various degrees of inadequate chilling. The evidence establishes that the climate of these Reservations is such that pistachios may be discarded as a potential crop without a specific analysis of the various degrees of chilling. Even the Tribes' original expert would find that pistachios are not even marginally viable in this area when the corrected climate data introduced by the Tribes is considered. I find that pistachios should not be considered as a potential crop in determining the irrigability of the Reservation lands.

2. Almonds

The farming of pistachios in the lower Colorado River area presented such an impracticability that the prospect could be discarded without a detailed analysis. The dispute over the farming of almonds presents a much closer question. The problems raised by the State Parties are to some extent legitimate concerns, but none appears dispositive.[29] A general discussion of these concerns will highlight their relative importance prior to a more specific calculation demonstrating the economic feasibility of the crop for this region.

The State Parties are concerned that the Tribes' plans for the growing of almond trees includes the use of drip irrigation. The Tribes have offered evidence that the use of drip irrigation does not result in reduced yields as claimed by the State Parties.[30] I find that the State Parties' evidence to the contrary is more persuasive and that the yields must be reduced. The

29. *See* State Parties' Post-Trial Opening Brief 127-49 (May, 1981).
30. *See* C.R. Exh. 13.

State Parties' expert witness had specifically studied this situation with an especially keen interest and concluded that almond yields decrease under drip irrigation.[31] It is unclear to what extent this yield reduction overlaps the yield reduction expected on sandy lands.[32] But some reduction appears in order. Such a position appears much more plausible because of the Tribes' refusal to confront the issue. Faced with this expert's testimony, the Tribes resort to a claim that yield reductions do not occur under sprinkler irrigation.[33] This assertion, even if true, departs from the proof offered by the Tribes which had projected their almond payment capacities based on drip irrigation.[34] The Tribes raise other arguments challenging a yield reduction under drip. None of these other arguments is persuasive.[35] The almond yields projected must accordingly be reduced by some amount.

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31. Tr. 4622-23, 4666-72. *See also* C.R. Exh. 10.

32. *See* Tr. 4709, 4734; C.R. Exh. 10.

33. Four Tribes' Post-Trial Opening Brief 42 (May 1981). The Tribes also state that the reduction cannot be quantified. But the testimony cited indicates only that it was not quantified rather than could not be quantified. *See* Tr. 4064, 4066, 4623, 4708-09.

34. *See, e.g.*, F.M. Exh. 2, Table C-1 n.7; C.R. Exh. 1, Table B-1 n.7. In fact, the Tribes' expert testified that he projected drip rather than sprinkler because sprinkler irrigation was unacceptable for the concerned lands for a variety of reasons. Moreover, he indicated that energy costs would double or triple under sprinklers. Tr. 6453-54. A switch to sprinklers to avoid the problems of drip irrigation now simply makes no sense.

35. The primary reason for loss of yield apparently relates to the lack of distribution of water across the root zone. Tr. 2529, 4062-66, 6549. The Tribes presented evidence that this problem might be cured by adding additional drip emitters, Tr. 2529-30, 6450, at minimal cost. Tr. 6451-52. If the answer were so simple the problem would not exist. The State Parties' witness claimed to have used more emitters than anyone else, without solving the problem. Tr. 4741. To solve the problem an entire second drip system would need to be installed to deliver water between the rows of trees as well as at the base of the tree. Tr. 4065-66. The cost

In addition, the State Parties question the viability of almonds in the Colorado River area because of an increased danger of frost. The evidence presented by the State Parties showed that almond trees would bloom between one to three weeks earlier in the Colorado River area than in the San Joaquin Valley because of early warmer temperatures.[36] On the other hand, the times of the average last critical frosts are approximately the same for the two areas,[37] and would fall within the blooming period if that period occurs one to three weeks earlier in the Colorado River area.[38] The almonds in the San Joaquin Valley face this danger in February and March and with earlier bloom dates the danger would simply be increased. In fact, there is another additional danger because the fog, which lessens the frost danger in the San Joaquin Valley, is not present in the Colorado River area.[39] The undisputed evidence shows that the average temperatures in the relevant months are warmer in the Colorado River area than those in the San Joaquin Val-

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estimated by the Tribes for a drip system was $1,135 per acre. *See* F.M. Exh. 2, Table C-1. Even the Tribes' expert admitted that sometimes additional emitters will not solve the problem. Tr. 6549-50. The Tribes also argue that the yield reduction in the San Joaquin Valley relates to the tight soils of that area and that the sandier soils of the Reservations are better suited to drip. Tr. 6472. Once again this presents too simple a solution. The problems related to tight soils are not the spreading problem; rather the Tribes' expert mentioned other problems such as ponding and crustation of the soil. Tr. 6472. In any event, the Tribes' expert admitted that the spreading problem applies to sandy soils as well. Tr. 6549.

36. *See* Tr. 4653; S.P. Exh. 175.

37. *See* C.R. Exh. 36; Tr. 6195-97, 6294. *See also* Tr. 4609-10; C.R. Exh. 24, at 5.

38. *See* Tr. 4609, 6617-18; S.P. Exh. 129, 175.

39. *See* Tr. 4609.

ley.[40] The conclusion that almond trees in the Colorado River area will bloom earlier than those in the San Joaquin Valley seems, in light of this evidence, not only reasonable but also compelling. The State Parties are thus correct that the increased threat of frost damage on the Reservations should adversely affect almond yields in some amount.

A related question concerns the number of chilling hours required for the growth of an almond crop. The same basic question arose in regard to pistachios. The State Parties contend that between 400 and 500 such chilling hours below 45°F. are required in November through February before an adequate almond crop will be produced.[41] The Tribes do not explicitly assert any lower figure as correct.[42] I find the State Parties' estimate to be correct.

The State Parties argue that the chilling hours in the Colorado River area is marginal because they believe that Parker and Needles receive respectively only 373 and 394 such hours annually.[43] This assertion of inadequacy is countered by evidence offered by the Tribes which contend that the relevant figures are 631 and 490 respectively.[44]

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40. *See* C.R. Exh. 34; S.P. Exh. 181.

41. *See* Tr. 3740, 4063, 4068-70, 4132-33. The Tribes' expert originally testified that between 600-800 such chilling hours were required. Tr. 1069, 1265. The Tribes' present position appears to be less clear with respect to almonds, *see* Four Tribes' Opening Post-Trial Brief 26-27 (May 1981), but in light of the State Parties' concession I see no reason to hold the Tribes to this earlier range.

42. *Cf.* Tr. 6938 (almonds requires less chilling hours than pistachios).

43. Tr. 4356-57; S.P. Exh. 117.

44. The 490 figure for Needles is undoubtedly somewhat understated for reasons discussed above regarding pistachios. The specific adjustment appropriate is apparently not in evidence. *See* notes 24-28 and accompanying text *supra*.

Neither side appears to be completely correct. The parties differ for two basic reasons. The State Parties contend that the total of chilling hours must be reduced by the number of hours when the temperature rises above 60° or 70° offsetting the hours on the same day when temperatures drop below 45°.[45] Although the Tribes assert that no such offset should enter the calculations,[46] their own witnesses acknowledged that such a phenomenon occurred.[47] Other evidence indicates that some offset is appropriate especially for regions other than the San Joaquin Valley.[48] The Tribes' reluctance to use this offset lies in the divergent expert views regarding the appropriate formula to reflect this adjustment.[49] The Tribes' estimate of chilling hours thus appears to be overstated. On the other hand, there is evidence that the State Parties' estimate possibly understates the chilling hour total. The State Parties estimated the total from minimum - maximum temperature records[50] rather than using the admittedly more accurate method of taking readings from a

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45. Tr. 3745-49.

46. The reason, apparently, is that standard practice does not incorporate such an offset. *See* Tr. 4567, 6300-01, 6927-30.

47. Tr. 6316-17, 6935, 6997.

48. *See* Tr. 3743-44, 4039, 4089-94, 4416-22, 4567, 4633-34, 4672, 4676, 4709-10, 4852-56; C.R. Exhs. 9, 28, 30.

49. Tr. 6299-303. The Tribes' expert performed some study of the magnitude of this difference and apparently concluded that the actual number of such hours above 70° is minimal. *See* Tr. 6316-17. This testimony is unpersuasive not only because of its lack of clarity but also because it appears directed only at two of the four months under consideration.

50. Tr. 3741.

thermograph[51] as did the Tribes' experts.[52] Each side's presentation has minor flaws.

The truth, I believe, lies between the figures advocated by the litigants. The question involves considerable uncertainty but I believe that the State Parties are more nearly correct on this estimate of chilling hours. Their own experts' admission that the effect of warmer temperatures exists greatly weakens the Tribes' case. The standard use of the Tribes' method in the San Joaquin Valley[53] does not necessarily make it appropriate for use in another region.[54] This observation seems particularly true as the San Joaquin almond growing region experiences minimal amounts of these warmer temperatures[55] while the experts for the Tribes neither clearly nor fully demonstrated that the same is true in the area of the Reservations.[56] Given this state of the record the warmer temperatures must be accounted for in some manner. The State Parties have used a system that at least constitutes an attempt to quantify that which the Tribes' experts claimed could not be quantified. Allowing for the uncertainty of this process as well as the potential measurement errors arising from the State Parties' failure to use a thermograph, I find that the appropriate chilling hours figures for Parker and Needles are in the mid-400's. This average figure is sufficient for the growth of almond crops but because there will be be-

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51. *See* Tr. 4744-45, 4760-61. The State Parties did offer evidence that the expected error was only 2% from the method they adopted. Tr. 3744.

52. *See* C.R. Exh. 37.

53. Tr. 4567, 6300, 6927.

54. Tr. 4672, 4676.

55. *See* S.P. Exh. 126.

56. *See* Tr. 6317.

low average years, some yield reduction seems appropriate.

The State Parties also raise a number of concerns which I find either irrelevant or de minimis with respect to almonds. A brief discussion will dispose of these claims.

The State Parties first claim that the incidence of summer rains in the lower Colorado River Valley[57] will adversely affect almond yields.[58] Any analysis of the record would indicate that summer rain was not considered by the State Parties' experts to be the most serious problem with almonds. This alleged problem was in fact given rather little weight.[59] The Tribes presented credible evidence that almond crops are grown with minimum losses in areas such as Northern California, which experience rain during harvest season.[60] The State Parties assert that rain damages almond hulls.[61] The Tribes never assumed that the hulls would be sold, so the possible damage to the hulls is irrelevant.[62] The State Parties' only other specific

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57. For a comparison to the San Joaquin Valley, *see* S.P. Exh. 127, 170; C.R. Exh. 32A.

58. Tr. 3754, 4630-31, 4845-47.

59. *See* Tr. 3754.

60. Tr. 6947-48. The State Parties' answer to this testimony is almost totally misguided. First, they criticize the witness' experience in the Colorado River area. Second, they note that the exhibits he used show averages rather than frequency or intensity of storms. State Parties' Post-Trial Opening Brief 141-42 (May 1981). These criticisms, of course, have no bearing upon this witness' testimony that other regions with summer rains successfully grow almond crops. The State Parties' final criticism of this witness, that rain damages almond crops, upon reference to the record, Tr. 4630, 4847, narrows to a belief that almond hulls are damaged by rain. This criticism is discussed more fully later. But this criticism has no independent significance if almonds are successfully grown in the areas with summer rains.

61. *See* Tr. 4630-31.

62. *See* F.M. Exh. 2.

claim[63] was a brief mention of mildew in the nuts but that difficulty was minimized by the State Parties' expert.[64] Given this state of the record I can only conclude that rain losses to an almond crop would be minimal.[65]

Similarly, the State Parties' concern with tree stress due to lack of irrigation during harvest is illusory. The harvest period for almonds takes from 45 to 60 days in August and September and the State Parties claim that the farmer cannot irrigate during this period because of water damage to the crop on the ground.[66] Lack of irrigation for such a period will stress the trees and reduce production in subsequent years.[67] The evidence, however, shows that almond orchards are routinely irrigated during harvest under drip or furrow irrigation. The common practice during harvest is to alternate the irrigation among the almond varities that are not yet ready for harvest.[68] Faced with this testimony the State Parties resort to criticism of drip irrigation and sandy lands.[69] To the extent that the Tribes' experts projected drip irrigation on sandy lands these projections are subject to attack, but those weaknesses in other parts of the case are not transformed into an independent weakness under the heading of tree stress.

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63. There was a general claim that rains cause great losses in almonds as well as other crops but the reason was never fully specified. Tr. 4845-46.

64. *See* Tr. 3754.

65. *See* Tr. 6947-48.

66. Tr. 4617-18.

67. Tr. 4618-19, 4625-26, 4653. The Tribes' expert agrees that such lack of irrigation would be a serious problem. Tr. 6318-19.

68. Tr. 6942-45.

69. *See* State Parties' Post-Trial Opening Brief 145-46 (May 1981).

The State Parties also consider that almond crops cannot be harvested on gravelly or cobbly soil because even a small rock will damage the harvesting machinery.[70] This concern was once believed by the State Parties to be the major problem for almond growing on the Reservation.[71] The Tribes have partially avoided the problem by planning to plant more almond trees on sandy lands rather than gravelly/cobbly lands.[72] This solution is only one of several proposed by the Tribes' experts.[73] The problems associated with rocks simply do not exist to the extent that the State Parties' expert claimed at trial.[74] To the extent that the Tribes plan to use the sandy lands of the Reservations for almonds, the problems associated with sandy lands should be addressed elsewhere.[75]

Salinity also concerns the State Parties. The Tribes' experts admit that salinity of irrigation water is a concern and that the water from the Colorado River to some degree has this characteristic.[76] On the other hand, the Tribes' experts claim that the level of salinity of the water, as represented by the State Parties, is lower than water which would significantly af-

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70. Tr. 4357, 4614-15, 4736-37, 4831, 4848-49.

71. Tr. 3754.

72. Tr. 6296.

73. *See* Tr. 6205-06.

74. This conclusion seems fully supported by the testimony of the Tribes' expert. It is additionally bolstered by evidence of existing almond orchards on gravelly soil. *See* C.R. Exh. 49 (photographs nos. 50-53).

75. In connection with their argument at this point, the State Parties also raise a minor point regarding the importance of stabilizing sandy soils and the advantage of using sprinkler irrigation for this process. *See* Tr. 4625-26. This difficulty should be subsumed within their claims regarding the disadvantages of drip irrigation and sandy soils.

76. Tr. 6202-05; F.M. Exh. 2, at 17; C.R. Exh. 1, at 16.

fect almond yields.[77] The evidence thus does not indicate that this factor should make almonds an unsuitable crop for the areas of the Reservations.

Given that a yield reduction is in order, the State Parties contend that a yield of 2,000 pounds of almonds (in shell) per acre is more reasonable than the 2,750 pounds projected by the Tribes.[78] This reduction in yield would result, the State Parties claim, because of a combination of poor, sandy soils, use of drip irrigation, and marginal chilling hours.[79] Mature almond trees will yield on average between 2,700 and 3,600 pounds.[80] The Tribes originally claimed that current production ranged from 3,000 to 3,300 pounds per acre.[81] Against this background the Tribes' estimate of 2,750 pounds seems reasonable and conservative, until the problems associated with the Tribes' plans are considered.

The State Parties reduced the almond yield projections primarily because they understood that the almond crop would be grown on sandy soils[82] under drip

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77. Tr. 6296-97; 6326-30. At most there would be a 1 to 1½% yield reduction for the almonds grown on the Chemehuevi Reservation. *See* Tr. 6330.

78. *See* Tr. 3761-63; S.P. Exh. 119; F.M. Exh. 2, Table C-1; C.R. Exh. 1, Table B-1.

79. Tr. 3757-58, 4061-72.

80. C.R. Exhs. 10, 12, 13, 14, 24, 26, 27, 38; S.P. Exh. 172; Tr. 1105, 4067, 4683, 6214-22.

81. Tr. 1105.

82. Tr. 6292. The reference of the Tribes' expert to sandy lands is explained by the Tribes as meaning that the Colorado River area soils are generally more sandy than the soils in the San Joaquin Valley. They claim it was not intended to mean that the Tribes project all their almond plantings on sandy soils, as that phrase has been used in this case. Four Tribes' Post-Trial Reply Brief 23 (June 1981). For purposes of this discussion, I will assume the Tribes correctly interpreted this testimony.

irrigation.[83] The State Parties presented a very credible expert who testified that almond trees grown on sandy loam will yield 30% less.[84] This figure translated into a loss in yield of between approximately 900 to 1,100 pounds (in shell) per acre.[85] This same witness also credibly testified that drip irrigation results in a reduction in almond yield.[86] As the State Parties note, the yield reductions related to lands and drip irrigation are, to some extent, overlapping.[87] This conclusion appears sensible because sandier land would be a natural place for anyone, including the State Parties' expert, to install a drip irrigation system. This combined reduction must be 1,100 pounds in shell.[88]

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83. F.M. Exh. 2, Table C-1 n.7; C.R. Exh. 1, Table B-1 n.7.

84. Tr. 4734.

85. *Id.* This witness gave the range of between 500 to 600 pounds per acre without specifying if his figures included the shell or just the almond meat. This failure to specify is understandable since he earlier stated that he always refers to meat pounds because the shell is worthless. Tr. 4670. The conversion is made by dividing the meat pounds by .55 to give in-shell pounds. C.R. Exh. 38, at n.1; C.R. Exh. 27.

86. Tr. 4622-23, 4666-72.

87. State Parties' Post-Trial Opening Brief 193 (May 1981).

88. The Tribes attack this calculation of the loss. First, they argue that the reduction in evidence was 600 pounds, not 1,100. Second, they contend that the State Parties have double-counted the reduction for sandy soils and drip irrigation because the evidence shows only one such reduction is appropriate. Four Tribes' Post-Trial Reply Brief 34-35 (May 1981). The State Parties acknowledged that while the reductions were overlapping, they did not reduce yields twice for the same factor. On the other point, there is some confusion based on the difference between in-shell and meat weights. The initial testimony compared the 600 pound reduction with the 2,000 pound in-shell yield figure. Tr. 4062-66. This is misleading because the original source for this reduction apparently meant the 600 pound figure to be in meat weight terms. *See* C.R. Exh. 10. Otherwise, other information supplied by him makes little sense in the context of this case. In any event, the State Parties' other expert witness clearly meant the yield reduction for sandy soils to be in meat pounds. *See* note 85 and accompanying text *supra*.

If the original Tribes' yield range is used (3,000 to 3,300 pounds in shell per acre)[89] a representative figure of 3,150 pounds in shell seems a realistic starting point. A reduction of 1,100 pounds leaves 2,050 pounds. The State Parties' estimate was 2,000 pounds. That figure also included a reduction for lack of chilling hours, but did not account for the increased danger of frost damage. I have found both factors to be significant in reducing expected yields. The remaining 50 pounds of reduction appears to be fully supported in the evidence.[90] In short, the State Parties' estimated yield of 2,000 pounds in shell per acre appears much more realistic than the Tribes' estimate of 2,750 pounds. I find that figure to be correct.

Given a yield estimated at 2,000 pounds per acre, the price factor becomes vitally important. The State Parties presented evidence that an almond yield of 2,000 in-shell pounds per acre combined with the prices and costs initially used by the Tribes results in negative payment capacity,[91] which means that no

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89. Tr. 1105.

90. Tr. 3757-58, 4063, 4068, 4071-72, 4772; S.P. Exh. 117. I understand the Tribes' evidence that the effect of insufficient chilling is not readily quantifiable. Tr. 6300-01, 6936-38. The Tribes imply that the State Parties reduced almond yields by 25% because of inadequate chilling hours alone. Four Tribes' Opening Post-Trial Brief 31 (May 1981). Regardless of the merit that argument contains in theory, it has no basis in the facts of this case. The yield reduction of 25% was the result of a variety of factors. I do not consider a final reduction of 50 pounds per acre excessive when there will definitely be a sizable portion of years without adequate chilling hours, even if the yearly total *on average* is sufficient. Moreover the possibility of frost damage should also be considered. The possibility of a further yield reduction to a level below 2,000 pounds per acre appears foreclosed only by the lack of a convincing assertion of such a position by the State Parties in either their experts' testimony or their briefs.

91. S.P. Exh. 119.

money would be generated to pay for water distribution facilities to bring water to the farm parcels. The Tribes counter with evidence that if 1980 almond prices are considered as a part of the five-year average almond price, the gross revenues will increase and a positive payment capacity will result.[92]

The Tribes originally projected payment capacities based upon costs and prices taken from different years. The cost data was from 1979, updated by an inflation factor to 1980 levels.[93] The almond price data was a five-year average with the last year's data from 1978. The State Parties' expert agreed that theoretically if 1980 costs are used then 1980 prices should also be considered as a part of the five-year average.[94]

The original theoretical mistake was made by the Tribes when they used 1980 costs without considering 1980 prices simply because they were satisfied that they had proved the feasibility of growing these crops without considering more favorable 1980 prices. They accuse the State Parties of selectivity in reducing yields but not increasing prices.[95] The Tribes' counsel and experts appear remarkably naive to expect that their adversaries would not attack the Tribes' yield projections and therefore prices would never be a crucial issue.

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92. C.R. Exhs. 56-58.

93. Tr. 7094; C.R. Exh. 1, Table B-1 nn. 6, 8; F.M. Exh. 2, Table C-1 nn. 6, 8.

94. Tr. 7236. The State Parties' expert quite correctly claimed that 1980 prices alone should not be compared to the 1980 costs, because the 1980 prices might not be representative. Later he appeared to acknowledge that theoretically the 1980 prices should be included in the five-year average if that average is compared to 1980 costs. *See* Tr. 7235-36.

95. Tr. 7095; Four Tribes' Opening Post-Trial Brief 47-48 (May 1981).

Nevertheless, I conclude that the theoretically correct approach is to use a specific year's cost with an average price including as the last price of the average the year at which the costs are pegged. The Tribes' approach as evidenced by its experts[96] includes the 1980 price in its average. The cost figures purport to be from 1980.[97] But the costs are not 1980 actual costs but rather 1979 costs increased by six percent to allow for inflation.[98] If the Tribes' theory of matching prices and costs as outlined above is accepted, then 1980 actual costs, as well as 1980 prices should also be considered. This information is not in the record, or at least the Tribes do not note it. The only figures in the record which I believe can be matched are the 1979 figures.

The Tribes' original computations are based upon a five-year average of almond prices with the latest price in the five-year average being the 1978 price.[99] Therefore, a new payment capacity based on 1979 costs and an average price with 1979 as the last year must be computed from the figures in evidence. Because the almond prices have experienced a rapid rise in recent years, I find that a three-year average price should be adopted from the data for the years 1977-79; this new payment capacity is $347 per acre per year.[100] A com-

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96. C.R. Exhs. 56-58.

97. *See* Four Tribes' Opening Post-Trial Brief 47 (May 1981); Tr. 1105.

98. *See* Tr. 7094; F.M. Exh. 2, Table C-1 nn. 6, 8; C.R. Exh., Table B-1 nn. 6, 8.

99. C.R. Exh. 56.

100. *See* Tr. 4083; Appendix 2. This computation is based upon the following assumptions that have been discussed in text:

1) Yield = 2000 lbs. per acre (S.P. Exh. 119)

2) Price = 76¢ per lb. in shell (3 yr. avg. 1977-79) (C.R. Exh. 56)

parison of this revenue analysis with the cost of the water distribution system will determine the irrigability of a large portion of the Tribes' claims.

The claims relating to almonds generally appear viable when those figures are used. On the Chemehuevi Reservation the area with the highest water cost per acre is Service Area A-2 with an annual cost of $171.[101] This is the only additional area claimed to be irrigable by the Chemehuevi Tribe. Thus, the Chemehuevi claims regarding almonds are factually sustained. The claims on the Colorado River Indian Reservation are sustainable because, of the 8,662 gross acres under consideration, none have an annual water cost per acre

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3) Costs - 1979 level with pre-harvest and harvest costs in S.P. Exh. 119 reduced by 6% amount noted in F.M. Exh. 2, Table C-1 nn. 6, 8

4) Interest - 10%

In addition, it also accounts for the present value of the net income stream in the manner advocated by the State Parties. *See* S.P. Exh. 157; C.R. Exh. 7A. *See also* C.R. Exh. 6. This method provides the most theoretically correct treatment of the problem because the Tribes' method of simply dividing the accumulated net income among the 30 years under analysis fails to recognize that the income is received in the later years while the water distribution system costs and associated costs would be accumulating in even annual amounts throughout the 30 years including the years before there is any income. The State Parties' method is simply an attempt to put all the revenues and expenses on a similar present value basis. To the extent that any party in any other analysis has failed to account for this factor, that analysis is theoretically inaccurate even though it bears the imprimatur of an expert. Perhaps the inaccuracy is deliberate in order to offset other factors that are not otherwise satisfactorily factored into the computation. But the Tribes do not make that argument. *See* Four Tribes' Opening Post-Trial Brief 53-55 (May 1981). Although it may be possible to construct a present value analysis that is structured in a manner that is better still, I will only make the adjustment now urged.

101. *See* CH. Exh. 1, Table 11.

greater than the $347 payment capacity.[102] On the Fort Mojave Reservation none of the projected parcels has a cost of water exceeding this payment capacity, so almonds would be a financially suitable crop there as well.[103]

3. Figs

The Tribes' claim that the Reservation lands can profitably produce a fig crop can be easily dismissed. This claim rests primarily upon the uncertain premise that fig trees on the Reservations will yield annually 2.9 tons of dried figs per acre.[104] This figure derives from a survey of fig production conducted by the Tribes' experts.[105] Compared to some of the figures in the survey, the Tribes' estimate appears reasonable and moderate, as a base figure for fig yields. But such a conclusion would be ill-founded, because those numbers in the survey exceeding the Tribes' estimate are actually *estimates* of *expected* fig yields in new high-density plantings.[106] The figures for yields actually achieved appear from the Tribes' evidence to range from 1.5 to 2.5 tons per acre.[107] Indeed, one of the Tribes' experts opined that 2.25 tons per acre was the maximum average yield under optimum conditions.[108]

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102. *See* C.R. Exh. 1, at 31. The cropping pattern on this Reservation projects one sixth of the acreage for permanent crops to be planted with almonds. *See* C.R. Exh. 57 n.3. This amounts to approximately 1,444 gross acres.

103. F.M. Exh. 2, at 32.

104. *See* F.M. Exh. 2, Table C-2; C.R. Exh. 1, Table B-2; CH. Exh. 1, Table B-2.

105. *See* C.R. Exh. 38.

106. Tr. 6219-21, 6312-13; C.R. Exh. 38, n.5.

107. *See* Tr. 6219-21; C.R. Exh. 38. This conclusion is supported by the State Parties' data as well. *See* C.R. Exh. 28; F.Y. Exh. 46.

108. *See* C.R. Exh. 28; F.Y. Exh. 46.

The figures relied upon by the Tribes' experts are untested. Future experience may support the Tribes' position but the hard, convincing facts available in this case do not support an expected yield of 2.9 tons.[109] This figure must fall and with it the Tribes' claims regarding figs.

The appropriate payment capacity supporting this conclusion is somewhat uncertain because of the lack of precision in the evidence. The State Parties urge a payment capacity based upon a yield figure of 1.7 tons per acre because that is the historical average.[110] That figure appears somewhat low and in any event a composite of the Tribes' historical figures produces a figure of roughly 1.9 tons per acre.[111] If a figure of 1.94 tons per acre is taken as the ultimate yield, a payment capacity of approximately $72 results.[112] This calculation appears fairly generous to the Tribes but even under

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109. The Tribes note that farmers are relying upon the higher expected yields by planting more figs in the high density grove. Four Tribes' Opening Post-Trial Brief 45-46 (May 1981). The farmers may hope to achieve these higher yields but it is not clear that a failure to achieve the yields will be crucial. Such farmers may not lose money with yields closer to the traditional level. Rather they may only make less money than such higher yields would have given them. In any event, I believe such estimates based on untested figures to border on the speculative when compared to the proven historical figures. These higher estimates may ultimately be correct but in the meantime there is really no means to test their validity. The uncertainty of these figures is well illustrated by the projections offered by a farm advisor named Levitt who on one occasion estimated a 3.5 ton production per acre, Tr. 6221, and at another time indicated that 3.0 tons should be expected. C.R. Exh. 38.

110. *See* S.P. Exh. 120; Tr. 3753-63, 4077-78, 4416-17. *See also* S.P. Exh. 178; CH. Exh. 25; C.R. Exhs. 28, 38; F.Y. Exh. 46.

111. *See* C.R. Exh. 38.

112. *See* Appendix 2. This calculation is based upon: the price initially used by the Tribes, which appears to be an average of the fig prices in years 1975-79; the harvest and pre-harvest costs adjusted to the 1979 level; and a 10% interest rate. *See also* note 100 *supra*.

this analysis the majority of the Tribes claims fail because the annual water costs exceed this figure.[113] Some acres in the Fort Mojave Reservation have water costs lower than this figure; but that figure does not include any allowance for additional costs appropriate for the region. All parties agree that the lower Colorado River region has greater rainfall during fig harvest than the other regions in which figs are grown.[114] Similarly, all parties agree that at some level of rainfall, certain costs must be incurred to preserve the fig crop. But it is not clear from the testimony, cited by the parties, what fraction of the annual fig crop would be affected on average by the instances of rainfall[115] that occur in this area. These expenses for handpicking and drying total approximately seven cents per pound.[116] And the Tribes note that the worst case, not to be expected, would occur if all the crops were subjected to these corrective measures.[117] Nevertheless, the evidence supports a finding that such significant rains (greater than .2" in one day)[118] occur perhaps one to two times per year in the harvest season.[119] One might realistically conclude that as much as a quarter of the crop would require this treatment each year. And a payment capacity analysis, including such a factor, yields an annual figure of $34 available for water costs.[120] Because water costs for all claimed parcels ex-

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113. F.M. Exh. 2, at 32; C.R. Exh. 1, at 31; CH. Exh. 1, Table 11.

114. C.R. Exhs. 32A; 33; S.P. Exh. 171.

115. *See* C.R. Exh. 33.

116. Tr. 6885. Such expenses apparently must be concurrent. *See* Tr. 6813. Raking would cost an additional cent a pound. Tr. 6885.

117. Four Tribes' Post-Trial Reply Brief 25-26 (June 1981).

118. Tr. 6884.

119. *See* C.R. Exh. 33; Tr. 6302-11.

120. *See* Appendix 2.

ceed this figure, I find that none of the Reservation lands will yield a profitable fig crop.

Upon reflection this conclusion might first appear unusual. It holds that under traditional practices fig farming generates a relatively small positive cash flow and will not be profitable even when considering moderate water costs. Such a result might ordinarily be questionable with respect to a common crop, but it seems justified with respect to this crop. Neither expert witness who testified regarding fig farming has consistently made money on his fig farm operations.[121] Given this background my findings appear fully supported.

4. Table Grapes

Table grapes present the most clearly feasible of the five permanent crops projected in the Tribes' claims. Even the State Parties' experts spoke highly of grapes as a generally profitable crop.[122] The State Parties, however, do not concede that grapes can be grown economically on the Reservation lands. Rather they estimate that grapes will produce a maximum of $58 per year to pay water costs[123] and that when certain extra costs associated with some of the parcels are considered, none of the parcels is practicably irrigable under a claim supported by a projection of a grape crop.[124] The Tribes' evidence amply supports a finding that grapes should be suitable and profitable crops on the Reservations, as elsewhere. The State Parties do not agree but, rather than demonstrating simply why this

121. Tr. 4682-87, 6868-71.
122. Tr. 4592.
123. S.P. Exh. 121.
124. State Parties' Post-Trial Opening Brief 198 (May 1981).

area is significantly different from other areas, they have produced evidence of a quantitative nature that inferentially would prove that grapes cannot be economically grown in places where they are currently grown. Given the unacceptability of that conclusion, coupled with the strength of the Tribes' evidence, I find that the facts show table grapes are an economically viable crop which can be grown on the Reservations.

The State Parties' economic analysis of grapes as a crop for the Reservations should begin to raise doubts in an observer's mind. The projected payment capacity provides only $58/year/acre for annual water costs associated with a water distribution system.[125] This analysis seems dubious because the State Parties' experts projected that the Reservation lands would yield a grape harvest identical to the yield obtained generally in Arizona; no specific yield reduction was made for climate or soils reasons[126] because the experts felt no justification existed for such a reduction.

These experts determined the representative yield for Reservation lands to be 4.4 tons (or 400 22-pound boxes called lugs)[127] which they believed to be the typical Arizona yield. This estimate was made with the knowledge that a yield of 3.85 tons (or 350 lugs) has been sufficient to be profitable throughout the state of Arizona.[128] The State Parties' dismissal of this fact as applicable only to lands with lower water costs[129] seems not only unsupported by the record but also an incomplete response. The statement in question, al-

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125. S.P. Exh. 121.
126. Tr. 4074-76; S.P. Exh. 121; *See* Tr. 3712-13, 4086, 4289.
127. Tr. 4074-76, 4086, 4289; S.P. Exh. 121.
128. F.Y. Exh. 43. *See also* F.Y. Exh. 38.
129. State Parties' Post-Trial Opening Brief 201 (May 1981).

though brief, presents an unqualified assertion from an agricultural extension agent in Phoenix contacted by the experts who desired to tap his knowledge. As the Tribes note, the State Parties' explanation of this evidence[130] creates severe doubt about the correctness of the State Parties' analysis.[131] The 4.4 ton yield projected by the State Parties exceeds the 3.85 ton yield by .55 tons. This excess would, at the State Parties' estimated price of $680/ton, generate an additional $374 per acre per year. According to the State Parties' analysis, the grape vineyards will be at full production in years 5 to 25. If the increased revenue from these

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130. In their reply brief the State Parties attack this evidence on other grounds which are unpersuasive. The response that this observation of profitability concerns only lands for which the development costs were incurred in the past (State Parties' Post-Trial Closing Brief 45 (June 1981)), seems inevitably true, but not important, because any intelligent observation should be based on historical data rather than unfounded speculation. To be sure the statement does not purport to compare current capital costs with expected revenue. But the State Parties draw a distinction which is too fine to be made absent some other proof. In the absence of evidence to the contrary, one would expect the change in both figures to be proportional. The State Parties do not specifically demonstrate in their response how capital costs would have grown at a rate significantly greater than revenues. Moreoever, there is good reason to suspect revenues have grown at least as much as costs since the price for grapes has doubled in the last several years reflecting increasing popularity of the product as well as inflation. C.R. Exh. 56. In any event, the State Parties fail to support the speculation in their brief regarding increased development costs with any reference to the record. Curiously, they state that there is no evidence to support this statement of profitability of grapes with a yield of only 3.85 tons per acre but fail to note that the opinion itself is evidence, F.Y. Exh. 43, while their speculative comments are not. The State Parties might have demonstrated with evidentiary facts the contrary position, but they do not. Absent such evidentiary impeachment the admitted statement stands as competent and unrebutted evidence of the proposition asserted and presumably based upon the declarant's experience which supports it.

131. Four Tribes' Post-Trial Reply Brief 37 (June 1981).

years alone is considered as an annuity at 10% interest, the present value of the increased cash flow is sufficient to support an additional expenditure for water of approximately $243 in each of the 25 years in the analysis. Those vineyards which show a profit at a yield of 3.85 tons must incur substantial water costs, yet the 4.4 ton yield will pay substantially more. The State Parties' projection of a payment capacity of $58 at a yield of 4.4 tons appears questionable in light of the State Parties' explanation of the profitability of farms with lower yields. Moreover, the State Parties' reading of this statement appears strained since the statement phrased in a broad, unqualified manner implies at least that lands with average water costs are still profitable with that lower yield. In the absence of a more persuasive explanation, the only logical conclusion to be drawn from the evidence is that grapes are more profitable than the State Parties admit.

The key to unravelling this dispute must be price. The Tribes originally proposed a grape price of $680 per ton[132] knowing that recent prices were significantly higher.[133] The State Parties accepted the Tribes prices and costs as reasonable.[134] When the State Parties attacked the Tribes' yield figures, the Tribes responded by urging that current prices represented by a five year (1975-80) average of $869/ton be considered.[135]

The State Parties were aware that the Tribes' experts had used older prices and that the newer prices were considerably higher.[136] The grape prices accepted by the State Parties' experts in fact represented an av-

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132. *See e.g.*, F.M. Exh. 2, Table C-6.
133. Tr. 1105.
134. Tr. 4020-21, 4082-85.
135. C.R. Exh. 56.
136. Tr. 4277-80; F.Y. Exh. 44.

erage of eight years stretching from 1971 to 1978.[137] These prices were compared by the State Parties to 1980 estimated costs when their expert admitted that with rapidly rising prices a two or three year average should be used.[138] Such a three year average would be $867 if 1977 to 1979 prices are considered.[139] Clearly this set of additional facts explains why the State Parties show a minimal payment capacity for grapes while Arizona growers generally may profitably cultivate vineyards yielding .55 tons per acre less than that projected by the State Parties.

The State Parties respond in two ways. First, they question whether the Arizona price would be achieved by grapes grown on the Reservations. Second, they attempt to demonstrate through S.P. Exh. 184 that the gross revenues (rather than prices or yields separately) they used are reasonable. These arguments can be dismissed.

The confusion injected into this case by S.P. Exh. 184 should be addressed first. The exhibit purports to show that gross revenues actually received by growers from an acre of grapes nearly matches that estimated by the State Parties' expert. The State Parties originally projected gross revenue per acre of $2,992.[140] This exhibit shows the actual gross revenue per acre to be $2,881 for 1977.[141] Ostensibly this evidence confirms the State Parties' original estimate, but upon closer examination it appears to be virtually meaningless in the context of this case as well as being based upon assumptions not fairly supported by the record.

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137. C.R. Exh. 56.
138. Tr. 4082-83.
139. C.R. Exh. 56. *See* F.Y. Exh. 44; Tr. 4277-80.
140. S.P. Exh. 121.
141. S.P. Exh. 184.

First, the data from which this exhibit derives, concern yield and prices in Kern County, California rather than Arizona.[142] The State Parties feel that Kern County yields are too high[143] but their estimates necessarily incorporate these high yields in this exhibit. This fact may simply be explained as giving the Tribes the benefit of the doubt on this issue but it really exposes the irrelevance of this exhibit. The State Parties calculate the fresh grape gross revenue for 1977 as:

Total Revenue (fresh grapes)		Harvested Acres		Marketing Charge		Revenue per acre
($30,770,000	÷	9,826)	×	.92	=	$2,881[144]

This analysis assumes nearly one-half of the grape yield becomes lower-priced crushed grapes. The above calculation offered by the State Parties fails to include the revenues from crushed grapes which increase the total by 15% to $3,300/acre.[145] This calculation is based upon Kern County yields of 8.4 tons per acre. Since the State Parties claims that Arizona yields, as

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142. Id.; C.R. Exh. 61.

143. State Parties' Post-Trial Closing Brief 30-31 (June 1981).

144. *Id.* at 31.

145. Although S.P. Exh. 184 holds out the $2,881 figure as correct without qualification, upon examining the background data (C.R. Exh. 61), the State Parties were forced to admit that actual total revenue per acre for grapes was 15% higher than $2,881. This calculation would be:

Total Revenue (Grapes)		Revenue (Fresh)		(Crushed)
$35,250,000	=	$30,770,000	+	$4,480,000

$$\frac{\$35,250,000}{82,500 \text{ (tons)}} = \$427/\text{ton overall}$$

$427/ton x 8.4 tons/acre x .92 marketing charge = $3,300.
(revenue per acre)

See C.R. Exh. 61; State Parties' Post-Trial Closing Brief 32 (June 1981).

well as Colorado River area yields, are 4.4 tons, the calculation should be adjusted with the proportional division between crushed and fresh grapes treated as constant:

Yields	Fresh (52%)	Crushed (48%)
4.4 tons	2.288 tons	2.112 tons

Fresh Revenues per acre

2.288 tons × $724.00 = $1,656.51

Crushed Revenues per acre

2.112 tons × $112 = $236.54

Total Revenues per acre

$1,656.51 + $236.54 = $1,893.05

That figure of $1,893.05 per acre represents the expected revenues for the Reservations if the entire methodology of the State Parties and S.P. Exh. 184 is adopted. Rather than confirming the State Parties' estimates it shows them to be overly generous, an unlikely situation. Moreoever, the State Parties' use of S.P. Exh. 184 proves too much, for if the 1977 Arizona price for fresh grapes ($955/ton x .92 = $879, C.R. Exh. 56) is substituted in the above formula, the States Parties have proved that Arizona gross revenues are $2,248 per acre. If this figure is used the grapes will never produce a positive payment capacity to pay for water costs.[146] This observation counsels against the soundness of the method behind S.P. Exh. 184.

Second, the assumption behind this exhibit seems fatally lacking in support. Although the exhibit purports merely to show gross revenues per acre, the crucial element is the assumed sale of nearly 50% of the grape yield in the lower-priced crushed grape market.

146. Even assuming the higher 1977 price, the first few years of costs at the 1979 level would appear as:

The expert, whose testimony supported the exhibit, apparently sought to prove that almost 50% of all grape yields on every acre became crushed grapes, as this apparently happens to the total Kern County table grape production. In fact, under astute cross-examination, he admitted that he did not know whether the Coachella Valley grapes go entirely to the fresh market with none to the crushed market.[147] The State Parties do not offer any evidence on this point which should have been the focus on their proof regarding grapes and S.P. Exh. 184, since that is the element of the figures which most significantly differs from the Tribes' analysis. I find this exhibit unpersuasive for lack of a showing that approximately half of all grape yields go to the crushed market. Moreover, any other conclusion would make absolute nonsense of the testimony of the grape growers who typically stated their yields in lugs and gave a price per lug without referring to a distinction regarding crushed grapes.[148] In fact, one of the State Parties' expert grape growers stated that he harvested a total of 500,000 lugs on

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Year	1	2	3	4	5
Revenue	-	-	1226	1635	2248
Pre-Harvest Cost	1226	1025	897	1016	1016
Depreciation	113	113	113	113	113
Interest (10%)	85	227	364	441	516
Harvest	-	-	618	821	1132
Annual Cost	1424	1365	1992	2391	2777
Net Cost	1424	1365	766	756	529
Accumulated Net Cost	1424	2789	3555	4311	4840

Thus, even when the higher 1977 prices are matched to 1979 costs, grapes would yield a negative payment capacity under the Arizona analysis prepared by the State Parties.

147. Tr. 7238.

148. *See* Tr. 1842-60, 5528-30.

1,090 acres and received an average of $14.70 per lug "across the board."[149] This sort of confusion is much more likely when one seeks to focus on a factor such as gross revenue rather than on the individual elements which are of primary interest as well as being easier to verify or refute when separately identified. Because of the undue confusion generated by this exhibit I will not consider it further for any aspect of this case. The State Parties' use of such an exhibit creates serious doubt about the credibility of their position regarding grapes.

Of course, the State Parties' economic analysis[150] might still be otherwise basically sound if the estimated prices can be supported without regard to S.P. Exh. 184. This conclusion would be feasible if, for example, the Colorado River area grapes would be harvested significantly later than the Arizona grapes, and, thus command a lower price. The State Parties, of course, urge that the lower price applies, but I find that a grape harvest in the lower Colorado River Valley would begin approximately one week after the grape harvest in the Coachella Valley. Because the Coachella harvest season lasts from mid-May to mid- or late-July,[151] the substantial majority of the grape harvest will be in direct competition with the Coachella Valley and nearby Arizona vineyards such as the White Wing Ranch. This earlier harvest will enable these grapes to sell for the higher Arizona price.[152]

The early harvest is clearly supported by the evidence. The State Parties note S.P. Exh. 166 which in-

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149. Tr. 5519, 5528-30.

150. S.P. Exh. 121.

151. Tr. 5569. There is also testimony that the Coachella harvest usually ends by the fourth of July. Tr. 4769.

152. *See, e.g.* Tr. 4602.

dicates that grape harvests at the Fort Mojave Reservation will begin approximately one and a half weeks after the harvest in the Coachella Valley. Rather than support their own expert's somewhat uncertain estimate of a two week to one month delay, this exhibit shows that, as with other portions of his testimony, this expert's estimate on harvest time is unduly critical of the Tribes' position.[153] Moreover, the other evidence also demonstrates that the Reservations further south from Fort Mojave are warmer still.[154]

The final blow is dealt to the State Parties' advocacy of a late harvest by a heat-unit analysis prepared by the Tribes' expert.[155] The late-harvest argument and the assorted problems it evoked arose in the State Parties' defense. The Tribes responded in part by a heat-unit analysis showing that the Reservations were

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153. The oft-cited testimony that the harvest would be 2 to 4 weeks later than Coachella's harvest draws the most attention. Tr. 4702. The same witness earlier predicted that grapes in Yuma would be harvested beginning probably the last week in June, Tr. 4602, which is one and a half months after the beginning of the Coachella harvest in mid-May. Tr. 4769, 5569. Not only does this testimony add further imprecision to the witness' later testimony, the variability of the testimony casts some doubt about its reliability.

In fact, all of this witness' testimony regarding harvest time is somewhat confusing. His estimates have the Colorado River area beginning harvest 2 to 4 or 4 to 6 weeks after Coachella. Tr. 4702, 4602. He also stated that Bakersfield in the San Joaquin Valley begins harvest three weeks after Coachella. Tr. 4770. Yet the evidence in the case shows that the Colorado River areas are warmer than Bakersfield in the relevant months, C.R. Exh. 34, and this witness also stated that grape harvests on the Reservations would begin between the Coachella and San Joaquin harvests. Tr. 4765. In fact, if average maximum temperatures are considered the sole relevant criterion, Parker and Yuma harvests should be much closer to Coachella harvests than Bakersfield harvests. C.R. Exh. 34.

154. C.R. Exh. 34.

155. C.R. Exh. 35.

substantially as warm as the Coachella Valley and that grape harvests on the Reservations would follow that of the Coachella Valley by only three days.[156] The analysis backing this conclusion was said to be in accordance with widely accepted procedures. This analysis, taken in conjunction with S.P. Exh. 166, convinces me that the grape harvests on the Reservations will follow those of the Coachella Valley by approximately one week, enabling such grapes to attain the Arizona prices.[157]

Rather than present any study quantifying their position, the State Parties rely only on the rather broad opinions of its expert grape grower. The criticisms at the Tribes' heat-unit analysis exceed the scope of the record. If the State Parties believed that the method used was not widely accepted or improperly applied they might have introduced evidence demonstrating that fact, or at least directed cross-examination to that area of the testimony of the Tribes' expert. Having failed to do so, the State Parties must content themselves to raising speculative doubts concerning this testimony.

When the Tribes' heat-unit analysis is compared to the testimony by the State Parties' expert grape grower, the result is obvious. The estimate by the State Parties' expert that there would be a two week to one month delay in harvest on the Reservations constitutes little more than an imprecise guess when the testimony is carefully read.[158] On the other hand, the Tribes' analysis stands unrebutted as to either

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156. Tr. 6194-95, 6291.

157. C.R. Exh. 56.

158. Tr. 4702. *See also* Tr. 4602, 4765, 4769-70.

methodology or application. The Tribes' evidence is, thus, more persuasive.

Given the harvests on the Reservations will be slightly later than the Coachella Valley harvest, it is reasonable to believe that to some extent these harvests will:

> 1) avoid substantially the summer rains and heat problems posed by the State Parties; and,
>
> 2) enjoy a higher price more like the early-harvested Arizona grapes[159] than the later-harvested grapes of the San Joaquin Valley.

The factors will thus favor a finding of feasibility.

The weather problems associated with a late harvest were much discussed at trial. The State Parties firmly established that summer rains begin to occur in the Colorado River area sometime in July.[160] Experts for both sides generally agree that rain in amounts as low as .1 to .15 inches in a storm can cause problems with grapes.[161] The Coachella Valley harvest, ending in mid to late July, generally precedes the July rains in that area.[162] The tail end of the Colorado River harvest would be somewhat more exposed to the threat of July rains because that harvest would follow the Coachella Valley harvest by approximately one week. There is

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159. After admitting that the time of harvest was usually considered the determining factor for price, the State Parties' expert avoided directly answering questions on cross-examination regarding whether the higher Arizona price was due to an early harvest. Tr. 7240-42. In any event, the State Parties' reply brief clearly attributes this higher Arizona price to an early harvest such as enjoyed by the Coachella Valley growers. State Parties' Post-Trial Closing Brief 44 (June 1981). *See also* Tr. 4602.

160. C.R. Exh. 32A, 33; S.P. Exhs. 127, 163, 164, 170, 171.

161. Tr. 4845-46, 6961-62.

162. Tr. 4702, 4769, 5524, 5531, 5546, 5569.

really no evidence, noted by the parties, which shows when in July the rains come to the Colorado River area. Because the end of the Coachella harvest occurs between the 15th and 25th of July,[163] there is a good chance that some of the Colorado River harvest about one week later would coincide with the July rains. The total effect really is uncertain because the rains at most would affect only a fraction of the crop. The State Parties' primary experts had some doubts regarding the rain but did not quantify those beliefs into any estimate.[164] The effect would in any event be less than the State Parties contend because the harvest will not extend into August as the State Parties contend. In fact, the existence of other grapes in Yuma County significantly undercuts the view that July rains in Yuma makes grapes there infeasible.[165] Similarly, July rains in the other areas cannot be dispositive.

According to the State Parties' experts, rain may possibly cause mold or mildew on the grape bunches.[166] But the State Parties' expert who organized much of their case simply could not positively state that this would be a severe problem or that it would preclude successful grape cultivation in this area.[167] In light of my finding that the "problem" is substantially less troublesome than predicted by the State Parties because the harvest will be significantly earlier than predicted, the remaining step is easy. The uncertain effect of late harvest rain on the overall grape crop harvested in this area cannot be considered to be an absolute deterrent. This conclusion accords

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163. Tr. 5569.
164. Tr. 3754.
165. Tr. 1843; C.R. Exh. 25.
166. Tr. 2391, 3754.
167. Tr. 3754.

with other evidence in this case. For example, there is evidence that grapes formerly grown at Yuma performed well and matured early, only to be removed for marketing reasons.[168] Obviously these grapes either arrived before the July rains or the rain did not seriously affect them. Moreover, the evidence also shows that a neutral farm adviser informed experts for each side that grapes would do well in the area,[169] and that there is no reason to reduce yields due to climate.[170] Finally, the grapes grown in the Phoenix area belie the assertion that July rain is an insurmountable problem for grapes that will be harvested at the same time as the Arizona grapes, because the Phoenix area received more July rain than any Reservation.[171] The July rains simply cannot be a deciding factor on this issue with

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168. F.Y. Exh. 47.

169. F.Y. Exh. 38.

170. F.Y. Exh. 42.

171. Tr. 6294-95; C.R. Exh. 31A. The grapes were said to be in Mesa, or in other words, the Phoenix-Tempe area. The State Parties argue that there is no evidence of the harvest date of these grapes. State Parties' Post-Trial Opening Brief 176 (May 1981). This statement ignores the testimony of the State Parties' own grape grower-expert who stated that a small planting of grapes in the Phoenix area is harvested between the Coachella and San Joaquin harvest. Tr. 4703. This fact means that those grapes must somehow either avoid or withstand the high July-August rains in the Phoenix-Tempe area. C.R. Exh. 32A.

The State Parties also claim that those grapes are not shown to be economic. Given that approximately 2,200 such acres are under cultivation, a conclusion of profitability seems much more logical than the opposite conclusion. In addition, this experience with rains in the Phoenix area more readily explains the advice of advisors from the Phoenix area who informed the experts that the climate of the Colorado River area was suitable for grapes. *See* F.Y. Exhs. 38, 43, 44. Growers in areas of scant July rainfall may consider the rain more of a problem or more difficult to overcome than do those persons who live in areas with greater rainfall in July and August.

respect to the Reservations. The same conclusion applies to the alleged summer heat problems.[172]

The last significant factor to consider is price. I have already rejected as misleading S.P. Exh. 184 and the inferences to be drawn from it. Arizona prices should be used because the Colorado River harvest will definitely occur at least as early as the Arizona harvest.[173] The older prices used in the Tribes' original analysis are also misleading because of the increase in

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172. When pressed, the State Parties' grower-expert gave rather inconclusive testimony on this subject. Asked if his opinion regarding two week's difference in harvest time would be a substantial difference because of summer heat, he stated that it would have "an effect" but "couldn't say that it would be a deterring factor." Tr. 4705. This conclusive analysis substantially undercuts the State Parties' position that summer heat makes this area unsuitable for grapes. This witness only would state that a would-be grower should "consider it as a factor" to be dealt with in growing table grapes in this area. *Id.*

173. The State Parties' grape grower-expert believed that in the Yuma and Parker areas the grape harvest would occur between the Coachella and San Joaquin harvests, somewhat similar to the Phoenix area harvest. Tr. 4703-04. That witness stated that Yuma area grapes would be harvested in June, July and August and in reference to the question of whether these grapes would enjoy the marketing competitiveness of early production as in the Coachella Valley the witness stated:

> They would enjoy the full effect of earliness. I think it would be toward the tailend of that early harvest.

Tr. 4602. Even under this witness' assumption that the harvest would begin approximately one month after the Coachella harvest, he still felt that the grapes would command a premium for early harvest. The current Arizona grapes fill the marketing slot between Coachella and San Joaquin. Tr. 4703. Thus, the argument that there is no marketing slot for the Colorado River grapes to fit between the Coachella and San Joaquin harvests is misleading. *See generally* Tr. 4355-56. The Colorado River grapes, harvested after Coachella but simultaneous with Arizona, should command on average the price which Arizona grapes command. This seems particularly true since, if the gap between Coachella and San Joaquin is only three weeks, then all these harvests must overlap to some extent. Tr. 4770.

price over the last few years.[174] Because the State Parties sought out this data regarding Arizona prices for the years 1977-79, I believe that even their experts considered such prices relevant to the present case.[175] Because they discovered such prices, found them to be higher than the Tribes' prices, and would normally use a three-year average price in rising prices, I consider it all the more correct to take the average of the years 1977-79 as those prices were revealed during cross-examination of the State Parties' expert.[176] I find that that average, $867 per ton,[177] represents a realistic price for use in the present analysis.

The State Parties argue that the Arizona prices should not be used because the Arizona acreage constitutes only a small sample in terms of the number of acres and thus price data from those acres are less reliable than the California data.[178] The State Parties' expert apparently does not dispute the statistical reliability of this Arizona price, because this situation is not truly a statistical sampling problem despite the choice of words. In any event, he did not dispute the accuracy of the price data produced by the Tribes.[179] The real objection appears to be that the production

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174. C.R. Exh. 56.

175. *See* F.Y. Exh. 44.

176. *See* Tr. 4277-80; F.Y. Exh. 44. *See also* C.R. Exh. 56. The State Parties' expert stated that with continually increasing figures a two or three year average would be justified. Tr. 4083. I will use this three-year average at least in part because the figures upon which it was based entered the case through the State Parties' expert and his files, and his papers indicate that the Tribes' experts originally used a seriously outdated average (1971-78) in the context of a significantly rising price level for grapes.

177. (955 + 943 + 930) x .92 x ⅓ = $867.

178. Tr. 7242.

179. *Id.*

of Arizona grapes is so small (3,200 acres), that additional plantings of several thousand acres might bring down the historic price.[180] This consideration does not persuade me to discard the Arizona price. The evidence shows that the grapes for these lands will compete with the Arizona *and* Coachella harvests,[181] as well as with San Joaquin in the later stages of the harvest. The Arizona price is the most relevant price to consider in this analysis. In addition, the inclusion of the Coachella production increases the size of the existing market beyond that which the State Parties consider. This argument fails first because it lacks any support other than a casual observation. The State Parties' experts did no formal market studies to prove this point[182] and even if they had, I am not certain they were sufficiently qualified to do so. Moreover, I do not feel that this market inquiry is appropriate in the present context. The Tribes may not plant such extensive vineyards as their claims indicate; they might turn to other crops as their experience grows. The limit of the scope of fact-finding in this case must occur at some point, and I draw that line at this issue.[183]

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180. Tr. 7192.

181. Tr. 4602, 4703-04, 5545. This conclusion was supported by the testimony of one of the grape grower-experts of the State Parties when he responded to a question regarding the performance of Arizona grapes by citing his experience with grapes grown in Yuma. Tr. 5537.

182. State Parties' Post-Trial Closing Brief 44 (June 1981). *See* Tr. 7243-44.

183. In addition I reject similar arguments that are tangentially related to the practicability of growing grapes on the Reservations. For example, I do not consider the absence of migrant workers or processing equipment from the Reservations' areas to be fatal to the Tribes claims. Nor do the absences of such factors as an established reputation and marketing connections seem relevant. Similarly, I do not consider the present lack of nearby cooling facilities to be fatal to the Tribes claims regarding grapes.

These considerations when used to modify the State Parties' analysis show that grapes may be feasibly grown on the Reservations. The price adjustment means that $187/ton more will be received for the grapes ($867 - $680 = $187), increasing gross revenue by $823 per acre (4.4 tons/acre x $187 = $823) annually in years 5 through 25 of the analysis.[184] This increased cash flow for only the 21 years of full production, would increase the present value of the expected cash flow to the extent that an additional $535 might be paid for water costs each year.[185] Certainly this exceeds the water costs for all tracts for which the Tribes have claimed water rights.[186] The one possible exception concerns the Fort Yuma Reservation because the State Parties have attacked aspects of the design of the irrigation systems on that Reservation. Such criti-

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184. *See generally* S.P. Exh. 121.

185. $823 x B (21, 10%)
$823 x 8.6487 = $7,118
$7,118 x A (4, 10%)
$7,118 x .6830 = $4,860

$$\frac{\$4,860}{B\ (25, 10\%)}$$

$$\frac{\$4,860}{9.0770} = \$535$$

186. *See* F.M. Exh. 2, Table 12; C.R. Exh. 1, Table 12; CH. Exh. 1, Table 11. This conclusion makes unnecessary extended consideration of the correctness of the State Parties' estimate of grape yields of 4.4 tons (400 lugs) per acre. *See* S.P. Exh. 121. The true yield figure, I believe, is somewhat higher. The 400 lugs per acre figure derives primarily from a conversation with an extension agent named Lowell True. Tr. 4076-77. That agent originally gave an estimate of 500 lugs for a current yield. Eventually he stated that the 500 lug figure was an optimum figure while the realistic figure over the last ten years was "closer to 400 lugs/acre." F.Y. Exh. 42. The manner in which this information came into evidence convinces me that the current realistic yield is higher, at least as high as 450 lugs per acre and possibly higher. *See* Tr. 4257-60, 4266-95. *See also* F.Y. Exhs. 43, 44, 45, 46, 47.

cisms should be considered in connection with the claims made on that Reservation. Except for that local problem, grapes appear to be a generally suitable and feasible crop for the five Reservations.

B. Claims Asserted by the Individual Indian Tribes

Aside from the general concern of crop suitability, the State Parties raise other concerns which challenge the specific claims of the four Tribes which have pressed such claims. Those allegations involve such matters as engineering designs and cost and soil classification of the land within the separate parcels. Because these matters are somewhat unique for each Reservation, those concerns should be addressed in connection with the individual Reservations. Furthermore, the results of such an inquiry serve as preparation for a finding of the number of practicably irrigable acres within each such Reservation.

1. Fort Yuma Indian Reservation

The Quechan Tribe of the Fort Yuma Indian Reservation claims lands in two general areas. The All-American Canal cuts this Reservation into northern and southern parts. In the southern area the Tribe supplements the claims of the United States by asserting that approximately 445 additional gross acres are practicably irrigable. These claims would add the following acres to the United States claims on the respective units:

FY-3	
Cal. Boundary	103
FY-9	
Ariz. Boundary	76

FY-10A	
Ariz. Boundary	142
FY-12	
Cal. Boundary	124[187]

The State Parties concede that 65 additional acres associated with Unit FY-3 and 33 additional acres associated with Unit FY-12 are practicably irrigable, but otherwise they concede no more than they did with respect to the United States claims.[188] In addition they note that Unit FY-12 contains 11 fewer acres than claimed by the Tribe. This measurement problem relates to the Tribe's other claim for adjacent land. In the northern area, the Tribe has claimed substantial additional irrigable acreage. At one time the Tribe's experts prepared a report supporting a water rights claim for 13,474 gross irrigable acres north of the Canal where the United States made no claim.[189] The Tribe later amended this claim on the basis of a soils survey which mapped 10,755 irrigable acres.[190] The area mapped as irrigable on these exhibits unfortunately combines the area north of the Canal with a small area south of the Canal that apparently overlaps with Unit FY-12.[191] Therefore, together with a reduction of 11 acres on Unit FY-12, I must adopt as the Quechan claim north of the Canal, the area measured by the State Parties which consists of gross acres in the amount of:

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187. *See* F.Y. Exh. 18, at 56; S.P. Exh. 151.

188. *See* S.P. Exhs. 110, 151.

189. F.Y. Exh. 18, at 57-58.

190. *See* F.Y. Exhs. 19, 30; Quechan Opening Brief 78-79 (May 1981).

191. *See* U.S. Exh. 14; F.Y. Exh. 30.

Northern Lands	
Cal. Boundary Land	10,637[192]

The State Parties respond that only 85 acres of this northern area is practicably irrigable.[193] The claims in each of these areas are meritorious in part.

(a) Lands South of the All-American Canal

The lands south of the All-American Canal represent a relatively minor matter. The Tribe expended only a modest effort to prove these claims. The claims are set forth in its expert's report[194] but are supported by only the most conclusional reasons.[195] Absent a more satisfactory explanation, the Quechan Tribe, which has the burden of proof, has failed to present a persuasive case in support of these claims. I find that only those lands conceded by the State Parties to be irrigable are practicably irrigable and thus entitled to water rights. These lands are:

	Gross Acres
FY-3	
Cal. Boundary	65
FY-12	
Cal. Boundary	33[196]

192. S.P. Exh. 151 & n.f.

193. S.P. Exh. 151.

194. F.Y. Exh. 18, at 56.

195. F.Y. Exh. 18, at 30-31. I have been unable to locate any more complete demonstration of irrigability. The Quechan brief, which merely cites the tabulated claims in its expert's report, is unhelpful on this point. *See* Quechan Opening Brief 74-75 (May 1981) (citing F.Y. Exh. 18, at 56).

196. S.P. Exhs. 110, 115.

(b) Lands North of the All-American Canal

The lands north of the All-American Canal were the focus of the Quechan's case. Much supporting evidence was presented regarding the water rights claims for these lands. On the other hand, competent evidence attacked the claims on engineering and soil classification grounds. After considering all the parties' arguments, as supported by the evidence, I find that 6,785 gross acres, or more than one-half of the land claimed by the Tribe to be irrigable, is in fact practicably irrigable. A brief discussion of the engineering and soils segments will reveal the bases of my findings.

(i) Engineering Design and Costs

The Tribe's experts initially proposed an irrigation system serving 13,474 gross acres north of the Canal.[197] As originally constituted the engineering plan met with the general approval of the State Parties' expert.[198] This testimony followed the adoption by the Quechan's experts of a smaller service area limited to 10,755 acres mapped by a soils expert.[199] Nevertheless, the State Parties had second thoughts about this testimony and later presented some evidence in a surrebuttal phase of the case which really addressed the case in chief presented by the Quechan Tribe rather than the rebuttal case presented by the Tribe.[200] In the surre-

197. F.Y. Exh. 18, at 56.

198. *See* Tr. 5462.

199. Tr. 1744, 2056; F.Y. Exh. 19, at i, 5; F.Y. Exh. 30. *See also* Tr. 6719-23, 6736.

200. On July 10, 1981, I issued an order overruling lengthy motion papers filed by the State Parties on the subject of allegedly improper rebuttal evidence presented by the Tribes. I reached that decision because that rebuttal evidence fairly appeared to meet defenses raised by

buttal phase the State Parties attacked certain of the Tribe's assumptions regarding capacity of the water delivery system and the size of the service area. Neither of these criticisms is fatal to the Tribe's claims.

The Quechan's expert gave several cost estimates for serving the area north of the All-American Canal. Each estimate was based upon different assumptions relating to the proper cost items to be considered and various legal arguments. The highest annual cost per acre offered by this expert was $344, the cost for Alternate II which would remove irrigation water directly from the Colorado River and transport the water by tunnel underneath the All-American Canal.[201] Even this figure, as the highest cost per acre, would be exceeded by the payment capacity for grapes as calcu-

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the State Parties. Some of the arguments of the State Parties would have required the Tribes in their case in chief to negate every conceivable defense that might be raised later. In order to avoid a new hearing in the event such rebuttal evidence was later determined by me or by the Court to be improper, I admitted this evidence, and the State Parties' subsequent motion papers failed to demonstrate that exclusion of the evidence was required.

The Quechan Tribe does not formally ask that I now exclude the State Parties' surrebuttal evidence, although they do label it as "improper in surrebuttal." Quechan Opening Brief 82-92 (May 1981). This testimony appears to me to be less proper as surrebuttal evidence than any of the rebuttal evidence which prompted the State Parties' strenuous objections. This surrebuttal engineering evidence contradicts only that portion of the Tribes' case presented on direct and known to the State Parties before presentation of their defense. It does not challenge the rebuttal testimony regarding the feasibility of tunnelling under the Canal which ostensibly prompted the State Parties' demand for surrebutal. Nevertheless, I viewed the admission of this testimony as an exercise of my discretion which I attempted to use in a manner allowing the fullest gathering of relevant facts to aid my decision.

201. F.Y. Exh. 57, at 7; F.Y. Exh. 58a, at 7; Tr. 6651-56.

lated previously.[202] Of course, the questions raised by the State Parties prevent an uncomplicated finding that feasibility is proven by this evidence alone.

There is first some question regarding whether the Quechan's expert designed a system that would provide sufficient water to irrigate the lands. Once the position of the parties is clearly understood, this dispute fades into insignificance. The issue was first raised when the State Parties' expert testified that 6,100 gal-

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202. *See* note 177 and accompanying text *supra*. The State Parties have taken the position that the Tribe may not legally take water from the All-American Canal at any point. Tr. 6662. The State Parties contend, therefore, that absent this legal foundation, the Tribe's evidence based on such use of the Canal, resulting in an annual cost of $274 per acre (F.Y. Exh. 18, at 45), fails to demonstrate that the lands can be economically irrigated and farmed. Tr. 6636-49; *see* Coachella Valley Water District's Brief re: All-American Canal (Jan. 1981); State Parties' Post-Trial Opening Brief Vol. II, 37-42 (May 1981); State Parties' Post-Trial Closing Brief Vol. II, 13-72 (June 1981). Because the Tribe has demonstrated a feasible cost using the Colorado River as a direct water source, this precise issue is not determinative and need not be reached. The State Parties assert but do not demonstrate that the Tribe may not tunnel under the Canal; hence, that plan does not suffer from the same alleged problem as does the Tribe's original plan. The findings I have made were based on the assumption that the comtemplated diversion would be from the mainstream of the river.

Even were it necessary to consider the evidence based on use of the Canal, I am unconvinced that the Tribe should be precluded from taking water from the Canal. It is well established as a matter of federal law that the United States, in creating Indian Reservations, impliedly intended to reserve water rights sufficient to irrigate these Reservations. *See* discussion of the *Winters* doctrine, Part One at I.A. (1) *supra*. It is highly likely that a court would find the water contracts, which provide for the construction of the Canal and the allocation of its waters, are subject to this federal law, since all of California's entitlement which has not been delivered to the state at points above Imperial Dam flows through the Canal. *See* Pr. Special Master Exh. 2, items 11-25. This is especially true where, as here, the United States retained ownership of the Canal. *Id.* In the alternative, it is evident that if these lands were to be made part of the existing Yuma Project, the contracts would expressly allow for diversion of Canal water to these lands. *Id.*

lons per acre per day as a peak application rate of water was not sufficient to meet the needs of deciduous crops.[203] This figure became relevant to the case only because the Quechan's expert submitted alternate calculations using the 6,100 gallon figure.[204] The primary figure used by that expert was 7,500 gallons per acre per day based upon advice from an agricultural expert.[205] This latter figure resulted in the $344 annual cost per acre and it does not possess the same alleged flaw that the lower figure does. In fact, because of the design adopted by the Quechan's expert, this irrigation system, as the State Parties' expert admitted, can be operated to deliver a greater peak application rate than 7,500 gallons per acre per day.[206] The State Parties' expert provided no analysis showing that the 7,500 gallon per acre per day design with the capacity to handle additional amounts was inadequate.[207] Although the State Parties contend that some costs calculated by the Quechan's expert are based on unfounded assumptions, they do not fault the other calculations assuming a higher peak application rate on the same basis. This issue is thus not determinative of these claims.

The State Parties' additional contentions regarding the size of the service area present a more complex problem. This issue arose in surrebuttal when the State Parties contended that costs for the Quechan's irrigation system were erroneous because they were

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203. Tr. 7186-89.

204. *See* Tr. 6656-62; F.Y. Exh. 58a, at 7.

205. Tr. 1823, 6655-56; F.Y. Exh. 57, at 7.

206. Tr. 7217-19.

207. *Id.*

based on serving a larger area than actually claimed by the Tribe to be irrigable.[208]

This situation occurred because of the unusual evolution of the Tribe's case. The Tribe's original report contained a claim that 13,474 gross acres in this area were irrigable.[209] Subsequently a soil survey revealed that the Tribe's soils expert found only 10,755 acres irrigable.[210] The engineering expert then testified that with slight modification his design could serve that reduced acreage,[211] and that his calculations would apply to the different service area.[212] The Quechan did in fact adopt that reduced acreage as their claim.[213]

The State Parties' expert contended that the original calculations of the annual cost per acre would not be reliable. The calculations would change because the cost of the system would be spread among 4,300 fewer acres as that number had now been dropped from the Tribe's original service area.[214] With fewer acres the cost per acre allegedly would increase or at least be uncertain.

The annual cost per acre may be somewhat indefinite for the lesser amount of acreage, but the evidence

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208. Of course, this position of the Tribe was perfectly plain from the Tribe's case in chief and a response need not have been delayed until surrebuttal. Tr. 1745-46, 2056.

209. F.Y. Exh. 18, at 59.

210. F.Y. Exh. 19, at i, 5; F.Y. Exh. 30.

211. Tr. 1745-46.

212. Tr. 6719-36.

213. Tr. 2056.

214. Tr. 7177-86. *See* S.P. Exh. 183. An examination reveals that although some areas are now dropped from the irrigation system others have been added. This fact explains, at least in part, why the State Parties may contend that 4,300 formerly claimed gross acres were dropped from a system of 13,474 gross acres and a new system of 11,769 gross acres substituted. *See* F.Y. Exh. 18, at 57-58; F.Y. Exh. 30.

sufficiently shows that the cost approximates that of $344 per acre[215] projected for the larger area. First, there is the calculation of the United States expert that a system of 2,580 gross acres in this general vicinity would have an annual cost of $312 per acre.[216] Second, the Tribe's expert flatly testified that his calculations were equally applicable to the smaller service area delineated on the map prepared by the Tribe's

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215. F.Y. Exh. 58a; Tr. 6656.

216. *See* F.Y. Exh. 53. I understand this set of calculations does not perfectly prove the Tribe's point but it is probative of the nature of costs for serving a similar irrigation system.

First, the State Parties have noted that the design was preliminary and perhaps subject to revision. State Parties' Post-Trial Closing Brief 54 (June 1981). Preliminary or not, the calculations are in evidence and not directly attacked by the State Parties. Moreover, because that expert served the Indian's trustee, the United States, in evaluating the possible claim for the Indians, the inference is strong that he would not evaluate this claim based upon imprecise calculations.

Second, there is implicit in the State Parties' reply brief the criticism that this expert's calculations are too low because he used too low a peak application rate for the consumptive use of water in his system. *Id.* at 53-54. For other purposes, the Tribes have claimed that this expert did use that low application rate. This proposition is not clear because the State Parties' expert indicated that the United States' expert "indicated that the peak consumptive use in his exhibit FY-53" of these lands was .37 inches per day, a figure that the State Parties' expert found acceptable. Tr. 7186-89. Moreover, F.Y. Exh. 53 includes $84 annual cost per acre for the cost of an on-farm irrigation system which does not appear in the $344/acre figure calculated by the Tribe's expert, because the on-farm costs appear in his payment capacity calculations as adopted from other experts. *See* F.Y. Exh. 18, at 48. In fact, the Tribe's expert calculated that if the lower peak application rate of water and the lower power rate and the 1979 costs adopted by the United States were used in his calculations, the annual cost per acre would decrease by $82. *See* F.Y. Exh. 58a; Tr. 6650-62. Although the United States' cost calculations appear possibly understated regarding the peak application rate of water, they are also overstated by a similar amount with regard to on-farm costs which appear elsewhere in the Tribe's calculations. The two sets of calculations thus prove that irrigation systems designed for areas between 2,580 acres and 13,474 will have similar annual water costs per acre.

soil expert.[217] Finally, even the State Parties' expert, after implying that total costs would not decrease with smaller service areas,[218] later amended his position. He first admitted that power costs would decrease but that capital pumping costs might not be reduced.[219] Eventually he admitted that even the capital pumping costs would be reduced for a smaller service area,[220] and he further stated that he did not perform any calculations to test what the effect of serving a smaller area would be on the calculations prepared by the Tribe's expert. Given this state of the record, I find the $344 annual cost per acre approximates the cost for serving an irrigation area in the northern lands whether that system serves from 2,580 acres to 13,474 acres.

(ii) Soil Classification

The Tribe's soils expert mapped 11,769 acres which he claimed to be irrigable and north of the Canal.[221] After allowing for drainage ways in the work areas he calculated that there was a total of 10,755 acres in this area.[222] All areas shaded on his map indicate irrigable

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217. Tr. 6736. When the expert gave this testimony on redirect he did not specifically state that the per acre costs would not change. But the only relevance of his "calculations" is in determining the annual per acre costs. Therefore, his reference to his calculations must have encompassed his annual cost per acre calculations. This seems particularly true in view of the preceding cross-examination, which directed that expert's attention to various cost figures as well as the different service area in the soils map. Tr. 6719-25.

218. *See* Tr. 7186, 7219.

219. *See* Tr. 7221-23.

220. Tr. 7223-24.

221. F.Y. Exh. 30.

222. *Id.*

soil classes II, III and IV.[223] The State Parties have challenged these figures. First, they claim that only 10,637 acres were mapped north of the Canal and that the Tribe's soils expert also included in his total figure areas south of the Canal that are associated with another irrigation unit (FY-12).[224] Even a cursory examination of the Tribe's soils map confirms the State Parties' assertion that the soils expert included lands south of the Canal in his total figures.[225] Yet the Tribe adheres to the 10,755 acres total as representing the claim north of the Canal.[226] The State Parties' figure of 10,637 gross acres north of the Canal thus represents the most reliable figure in evidence regarding the acreage claimed by the Tribe to be irrigable north of the Canal as does their 273 gross acre estimate for Unit FY-12. Second, the State Parties argue that the Tribe has overreached in its claim and that this acreage should be described as:

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223. *Id.*; Tr. 6398.

224. S.P. Exh. 151 n.f.

225. *See* F.Y. Exh. 30. In fact, the soils expert stated in his report that he had classified such lands. F.Y. Exh. 19, at i.

226. *See* Letter from Raymond Simpson with attachments (Nov. 5, 1981), record item no. 199.

	Gross Acres
Arable	
—Practicably irrigable	85
—For permanent crops only and water costs exceed payment capacity	5,540
—For field crops and water costs exceed payment capacity	280
Nonarable	
—Low moisture holding capacity	3,572
—Excess gravel or rough topography	1,160
	10,637[227]

The State Parties thus challenge almost all of this claim. I have already answered the argument that water costs exceed payment capacity and thus address only other concerns.

The Quechan Tribe does not extensively address the issue regarding the 1,160 gross acres classified by the State Parties as nonarable due to allegedly excess gravel and rough topography. The Tribe's expert classified these lands as arable because he classified all lands shaded on his map in this manner.[228] On the other hand, the State Parties treatment of this land is similarly brief.[229] The land depicted in the one piece of photographic evidence submitted by the State Parties on this issue appears no more ill-suited to permanent crops than did other land for field crops claimed by

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227. *See* S.P. Exhs. 139, 151.
228. Tr. 6398-416; F.Y. Exh. 30.
229. *See* Tr. 5080-82; S.P. Exhs. 134, 139.

the United States.[230] Moreover, this view is supported by the classification as irrigable of large portions of this area by the United States' soils expert.[231] Under these circumstances, I find that these 1,160 acres are arable.

The other contested areas consist of some 3,852 gross acres considered by the State Parties to have low moisture-holding capacity (3,572 acres) or excessive water costs (280 acres). I recognize that I have previously rejected the majority of the State Parties' arguments relating to the moisture-holding capacity.[232] However, these lands present a fairly speculative claim on other grounds. These areas constitute the bottom of large washes which cross the northern lands.[233] The United States' soils expert classified virtually all of this contested area as non-arable.[234] Even though he revised his opinion to claim as arable Rositas soils with somewhat low moisture-holding capacity, he never revised his opinions regarding these northern lands, because he claimed that no such soils were present in these lands.[235] When this consideration is added to the difficulty of farming in a wash, the Tribe as claimant has failed to persuade me that these 3,852 gross acres

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230. *See* S.P. Exh. 134; Part Two at I.C. *supra*.

231. *Compare* S.P. Exh. 139 *with* U.S. Exh. 13. The State Parties believe that this 1,160 acres includes lands mapped as non-arable by the United States' expert. *See* S.P. Exh. 151 n.c. While that statement is true, a large portion of the lands were apparently classified as arable as well. The evidence as I understand it, will not permit a specific determination of which lands were classed as arable by the United States' expert.

232. *See* Part Two at I.B.(1) *supra*.

233. Tr. 6413-14. This is true for areas colored in yellow on S.P. Exh. 139. The same conclusion seems appropriate with respect to the pink area on S.P. Exh. 139, since it connects two yellow-wash areas.

234. *Compare* S.P. Exh. 139 *with* U.S. Exh. 13.

235. Tr. 210-14.

are practicably irrigable. The State Parties presented competent evidence, if any was needed, showing that flood damage to agricultural equipment can easily occur in active washes.[236] The Tribe's expert, however, stated under cross-examination that there had been no study of the amount of water runoff or possible flood control south of the diversion dike, which is to lie at the north edge of the proposed unit, and north of the All-American Canal.[237] This expert seemed to indicate that he would channel all the runoff water from north of this diversion dike down two natural washes,[238] even though there are several other washes presently carrying runoff water in this area.[239] I fail to understand how this expert has sufficiently planned for the problems associated with floods in the large washes resulting from water runoff from an area of approximately 13 square miles.[240] With respect to the large washes, challenged by the State Parties, I find this combination of factors persuasive of the impracticability of farming this area of 3,852 gross acres.

The remaining 5,625 acres were found by the State Parties to be arable but of that total, 5,540 acres were claimed to be impractical to farm only because water costs allegedly exceeded the benefits from permanent crops on this land.[241] Having disposed of that contention, I may not yet find that the entire 5,625 acres are practicably irrigable because the State Parties have raised a question regarding the boron content of these

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236. *See, e.g.*, Tr. 4909-13.
237. Tr. 1805-06.
238. Tr. 1806-08.
239. *See* S.P. Exh. 139; Tr. 6413-14.
240. Tr. 1810-11.
241. S.P. Exh. 139, 151.

lands which may injure permanent crops.[242] The dubious nature of this "problem" can be seen from the manner in which the State Parties and their soils expert describe it. They state that boron found in "some areas"[243] may be of "some concern,"[244] and that additional field tests need be made before one can ensure successful farming[245] because boron is somewhat more difficult to leach than are other salts.[246] These statements hardly warrant the conclusion that all 5,540 acres are definitely not suited for permanent crops. In addition, the Tribes presented testimony that boron, although a concern, does not preclude farming such lands because boron problems have been successfully remedied elsewhere.[247] This conclusion of the Tribe's expert is supported by the State Parties' expert who classified these lands as arable despite any boron content of the soil.[248] Hence, I find that the evidence respecting boron content of these lands is not of the type which would preclude a finding of arability of these lands.

In short, I find that 6,785 gross acres north of the All-American Canal are arable. Considering the suitability and economic analysis above, these acres are thus, practicably irrigable.

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242. State Parties' Post-Trial Opening Brief 86-87, 92-93 (May 1981).

243. *Id.* at 86.

244. Tr. 3244.

245. Tr. 5084-85.

246. Tr. 5083-84.

247. Tr. 6407-09.

248. S.P. Exhs. 139, 151.

(c) Conclusions Regarding Practicable Irrigability of Fort Yuma Indian Reservation Lands

The gross irrigable acreage consisting entirely of boundary land in California both north and south of the Canal must be converted to net figures. As performed by the Tribe's experts[249] this calculation would be:

California Boundary Lands	Gross Acres		Net Acres
Northern Lands	6785 x .90	=	6107
Southern Lands	98 x .94	=	92
Total			6199

The net acres are thus entitled to diversion rights as follows:

Net Acres		Diversion Rate (A.F.)[250]		Total (A.F.)
6199	×	6.67 (A.F./Ac.)	=	41,347 (A.F.)

The decree should be amended accordingly.

2. Fort Mojave Indian Reservation

The State Parties argue that a substantial amount of acres claimed by the Fort Mojave Tribe as practicably irrigable are non-arable for a variety of reasons.

(a) Arability Questions

(i) Low Moisture-Holding Capacity

The single largest category of disputed lands is labelled as sandy lands. Such lands total approximately 983 gross acres and face the State Parties' contention

249. *See* F.Y. Exh. 18, at 59.
250. 439 U.S. at 422.

that they lack adequate moisture-holding capacity.[251] These lands lie on parcels FM-1, FM-105, FM-107, FM-128, FM-129, and FM-130. As the State Parties note the United States' soils expert classified much of these lands as arable under SCS standards.[252] Yet the lands were not claimed by the United States to be practicably irrigable and, therefore, the Tribe's claim must be examined to some extent on its own merits. Generally, the "sandy" lands fall into two categories.

The first type of land consists of areas from which the Tribe's experts project permanent crops. These lands lie within two contiguous parcels in Nevada, FM-1 and FM-107, and total 567 gross acres.[253] The State Parties' soils expert believes these two parcels are virtually identical in soil character.[254] These lands were not subject to a United States claim for water rights because of the soil's low moisture holding capacity.[255] The United States' experts reasoned that the low moisture-holding capacity of the soils made sprinkler irrigation infeasible.[256] Because the United States considered only field and row crops for these lands, this conclusion regarding sprinkler irrigation resulted in a failure to claim water rights for these lands. The crops considered by the United States are not suited to irrigation systems such as drip irrigation which can feasibly deliver water more frequently.[257] The Tribe's experts have found the permanent crops projected for

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251. *See* S.P. Exh. 147 & n.a.

252. *See* Tr. 282-87, 309-14, 324, 337-39; U.S. Exhs. 2, 4; F.M. Exh. 2, Plate No. 2.

253. *Compare* C.R. Exh. 50; F.M. Exh. 2, Plate No. 2; S.P. Exhs. 147, 158A, 158K.

254. *See* Tr. 3150.

255. *See* Tr. 310-11, 337-38, 638.

256. Tr. 719-20.

257. Tr. 719-23.

these lands to be suited for this type of drip irrigation.[258] Those experts believe that drip irrigation can economically satisfy the crop's water requirements.[259] Given that these irrigation systems can provide the water to the crop as needed, the inquiry regarding feasibility should shift to the economic feasibility of such a system as designed.

From this point of view, the State Parties' arguments that these lands are not irrigable, due solely to a soils classification showing low moisture-holding capacity, are unpersuasive. In discussing these particular parcels, the State Parties' soils expert virtually proved the Tribe's point by his own statements. He indicated that the moisture-holding capacity of these lands was so low that "you are practically forced into something analogous to drip irrigation or sprinklers."[260] In explaining his findings that these lands were non-arable, he further stated that he considered any irrigation system that would be economical but that with drip or sprinkler irrigation the crop revenues must be higher and that costs would be lower for such crops on contiguous land of a better quality.[261] These comments miss the mark for several reasons. First, the Tribe's experts always projected drip irrigation for these lands, so "forcing" it upon them does not damage their case. Second, the possibility that other land is of better quality and would make a better farm unit is irrelevant. The present inquiry does not concern the relative merits of various parcels of land such as would be important if one were to choose which land to cultivate first. Rather the question is whether any given parcel

258. *See* C.R. Exh. 50; F.M. Exh. 2, app. C. *See also* Tr. 723.
259. Tr. 1111-13, 6463; C.R. Exh. 50; F.M. Ex. 2, app. C.
260. Tr. 3150-51.
261. Tr. 3151-52.

can be cultivated successfully. Third, the reference to higher crop revenues required to pay for a drip irrigation system simply illustrates that the appropriate concern with this technology is a comparison of costs and revenues rather than a bare finding of non-arability for low moisture-holding capacity that is unaccompanied by such analysis.[262]

The second type of "sandy" lands on the Fort Mojave Reservation consists of lands for which the Tribe's experts have projected field and row crops. The lands total 416 gross acres on Units FM-105, FM-128, FM-129, and FM-130.[263] In each instance the State Parties' evidence indicates that the moisture-holding capacity of these lands is very similar to that of lands which I found irrigable in connection with the United States claims.[264] Those other lands were such that their moisture-holding capacity was sufficient to enable them to be served by economical irrigation sys-

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262. The economic analysis that is relevant is considered elsewhere. The State Parties generally did not at the hearings attack the costs proposed by the Tribe's expert, but did dispute various yields and prices profferred by the Tribe. *See* notes 1-4, 78-103 and accompanying text *supra*. The outcome of that analysis should determine whether lands with low moisture-holding capacity are to be further considered rather than the conclusional findings of the State Parties' soils expert.

263. *Compare* C.R. Exh. 50; F.M. Exh. 2, Plate No. 2; S.P. Exhs. 147, 158J, 158Q, 158R, 158S. In addition, Unit FM-126, consisting of 35 gross acres, lying in Arizona near the River, is subject to a dispute which includes its alleged lack of sufficient moisture-holding capacity for field or row crops. *See* S.P. Exh. 158P; C.R. Exh. 50. The State Parties, however, did not classify this parcel as one consisting of "sandy" lands, but rejected it as "other non-arable" land. *See* S.P. Exh. 147. The State Parties' soils expert's testimony and the State Parties' documentary evidence indicate that this parcel is non-arable partially because of "sandy" lands. Tr. 3170-71; S.P. Exh. 158P. The criticism of this parcel regarding moisture-holding capacity can be addressed at the same time that the other sandy lands are discussed.

264. *See* S.P. Exh. 22.

tems for field and row crops.[265] For the sake of consistency the same must be said of these lands. And certainly the Tribe's experts believe that their plans constitute a design of a system which will economically serve field and row crops on these lands which they believe are nearly identical to those lands claimed by the United States to be practicably irrigable.[266]

The State Parties also have raised a number of related deficiencies regarding "sandy" lands.[267] For reasons explained regarding the United States claims, I find these arguments unpersuasive,[268] and merely note that competent evidence supports the contrary position.[269]

A related question concerns the State Parties' contention that grapes will have a negative payment capacity on sandy lands.[270] The State Parties' conclusion regarding grapes grown on sandy lands results from a 10% increase in production costs for the alleged difficulties in farming on such soil.[271] This argument derives from the same analysis, presented by the State Parties, which was intended to show that field and row crops would be subject to a 25% increase in such

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265. *See* Tr. 5684, 5688, 5729-30, 5765-66, 5768, 5791, 5859, 5920.

266. *See* C.R. Exh. 50; F.M. Exh. 2. Given this conclusion I need not reach the Tribe's alternative claim that permanent crops served by drip irrigation are economically feasible for these parcels. *See* C.R. Exh. 50; F.M. Exh. 2, app. A. If such a claim were to be decided, I am confident that the result would support the conclusion I reach here.

267. *See* State Parties' Post-Trial Opening Brief 11-14, 22-37 (May 1981). These related deficiencies are discussed in the context of the United States claims. But similar arguments would necessarily apply to the Tribe's claim regarding sandy lands.

268. *See* Part Two at I.B.(2) *supra*.

269. *See, e.g.*, Tr. 6027-35, 5998, 6454.

270. *See* State Parties' Post-Trial Opening Brief 198-99 (May 1981).

271. *See* Tr. 3712-13, 4085-87. The "sandy" lands costs were specifically tailored for the Fort Mojave Reservation. *See* Tr. 3707-12.

costs.[272] For the specific reasons relating to my earlier rejection of the 25% figure,[273] I find that this 10% increase does not truly reflect the expected costs for these lands.

In short I find that the sandy character of the soil resulting in a lack of moisture-holding capacity or any other alleged related deficiencies fails to justify a finding that any of these lands are not practicably irrigable.

(ii) Other Alleged Soils Deficiencies

Some of the parcels discussed above contain alleged deficiencies other than low moisture-holding capacity. The units are FM-129,[274], FM-130,[275] FM-1 and 107,[276] FM-105,[277] and FM-126.[278] These deficiencies relate to such matters as high water tables, marsh lands and sloughs. Such problems seem likely since these parcels lie fairly close to the River.[279]

These problems constitute serious obstacles to the successful farming of portions of these parcels. The Tribe's expert really had no answer when asked if these sorts of problems exist on the lands.[280] On the other hand, the State Parties' failure to exclude these lands generally on the basis of these problems rather

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272. The percentage difference is attributable to the fact that a far greater portion of the production costs associated with grapes relate to vine care which is not affected by sandy soil. *See* Tr. 3712-13, 4085-87.

273. *See* Part Two at I.B.(3) *supra*.

274. Tr. 3140.

275. Tr. 3145; S.P. Exh. 44.

276. Tr. 3150.

277. Tr. 3153-54.

278. Tr. 3170-71; S.P. Exhs. 147, 158P.

279. *See* F.M. Exh. 2, Plate No. 1.

280. *See* Tr. 1230-32, 1386-89.

than the low moisture-holding capacity problem indicates that these present problems do not occur uniformly throughout these parcels.[281] Indeed, this conclusion is supported by the State Parties' soils expert who described some of these parcels in such a manner that implies that the problems exist on only a portion of a parcel that may be disputed for reasons that also include low moisture-holding capacity.[282] I thus believe that limited portions of these parcels must not be given water rights, but that limitation can only be applied where I can find some rational means of determining which acres are affected.

Fortunately, I believe that with respect to most of these parcels, such evidence came in through the United States' soils expert. Although he did not exclude lands from consideration solely on the basis of low moisture-holding capacity,[283] that expert did attempt to determine other problems with lands that would render them non-arable or non-irrigable.[284] In some instances he gave an estimate of the number of acres he excluded as non-irrigable or non-arable. Those acres I find non-irrigable are:

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281. In the State Parties' primary exhibits, parcels FM-129, FM-130, FM-105, FM-107, and FM-1 were shown to be disputed solely on the basis of low moisture-holding capacity. *See* S.P. Exhs. 147, 158A, 158J, 158K, 158P, 158R, 158S.

282. *See, e.g.*, Tr. 3140-46.

283. *See* Tr. 335-39; U.S. Exhs. 2, 3, 4.

284. *See* Tr. 312.

Unit	Gross Acres
FM-105	50-60
FM-128	90-100
FM-129	0
FM-130	76[285]
Approximate Total	226

Thus, the United States' work confirms these arguments of the State Parties to the extent of 226 gross acres.

The dispute over FM-1 and FM-107 merits separate discussion. The State Parties' expert thought that it was cut up by sloughs.[286] The United States' soil expert indicated that the area of the units with high water table problems was the southern part of the units, involving an area of between 15 to 20 acres.[287] The Unit FM-1 originally consisted of 640 acres but the Tribe's expert excluded 128 acres for groundwater problems,[288] and the final unit does not include the lands along the River or the southernmost part of the

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285. *See* Tr. 283-86. The figure for FM-130 comes from the State Parties' exhibit. S.P. Exh. 158S. Although the United States' soils expert did not specify a particular number of acres, his description of the acres which he found non-irrigable or non-arable generally conforms to that given by the State Parties. *Compare* Tr. 284-85; U.S. Exhs. 2, 3, 4; S.P. Exhs. 41; 158S.

With respect to the disputed parcel, FM-129, the United States' soils analysis supports the Tribe's view that the 21 gross acres in contest are irrigable or arable. *Compare* U.S. Exhs. 2, 3, 4; S.P. Exhs. 41, 158R. This parcel represents something of a curiosity because the State Parties' exhibits refer only to the alleged problem of low moisture-holding capacity and at the hearings the State Parties' soils expert did not mention that alleged problem and simply described the unit as having soils that were "coarse and gravelly and nonarable." Tr. 3140; *see* Tr. 3135-40.

286. Tr. 3150.

287. Tr. 311-12.

288. C.R. Exh. 50 n.1 (FM-1).

area.[289] Therefore, I find that the lands included in the final unit are irrigable or arable.

One further wrinkle must be considered. The Tribe's claim regarding FM-126 does not appear to be based on any soils classification. The unit was not marked on the United States' exhibits as belonging to any soils group.[290] The Tribe's post-trial submission regarding the particulars of its claim acknowledges this fact by the absence of any classification under the heading of soil description,[291] an omission that occurs solely with respect to this tract.[292] This finding is not surprising since the Tribe's experts did not attempt to classify soils[293] and the United States' soils expert did not classify it either. Thus, this disputed claim for 35 gross acres must be denied.

In sum, the lands along the river for which water rights claims have been made cannot be sustained with respect to a total of 261 (226 + 35) gross acres.

(iii) Other Arizona Lands

The State Parties have challenged as non-arable approximately 305 gross acres of lands in Units FM-114, FM-115, FM-116, and FM-119,[294] which lie generally near the eastern boundary of the Reservation in Arizona.[295] Although the United States' exhibits are not particularly clear on this point, its soils expert ap-

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289. *See* Tr. 1285-89; F.M. Exh. 2, Plate No. 1.

290. *Compare* F.M. Exh. 2, Plate 1; U.S. Exhs. 2, 3, 4; S.P. Exh. 41.

291. The Tribe did do some soil tests of its own. C.R. Exh. 50. For a discussion regarding the reasons I find this exhibit unpersuasive, see note 298 *infra*.

292. *See* F.M. Supp. Exh. (Sept. 1981), record item no. 192.

293. *See* Tr. 1250.

294. *See* S.P. Exhs. 147, 158L, 158M, 158N, 158O.

295. *See* F.M. Exh. 2, Plate No. 1.

parently either failed to classify these lands or classified the great majority of them non-irrigable or non-arable.[296] Indeed, the Tribe now claims that the soils in these parcels consist of BIA classes V-VIII soils,[297] which are the non-irrigable or non-arable classes.[298] Absent a presentation by the Tribe of a more favorable soils classification by a qualified expert, I agree with the State Parties that the 305 gross acres under present dispute are non-irrigable or non-arable. The water rights claim will be adjusted accordingly.

(b) Conclusions Regarding Practicable Irrigability of Fort Mojave Indian Reservation Lands

For the Fort Mojave Tribe the outcome of an analysis of the costs and benefits of cropping patterns combined with my findings regarding the arability of soils will determine the quantity of water rights to be received.

Less than one-half of the lands for which the Tribe has asserted water rights claims based on permanent crops are located in those parcels claimed solely by the Tribe; the other such lands, by implication overlap the

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296. *See* Tr. 285-87; U.S. Exhs. 2, 3, 4; F.M. Exh. 2, Plate No. 1.

297. *See* F.M. Supp. Exh. (Sept. 1981), record item no. 192.

298. Despite this statement, the Tribe protests in its reply brief that the BIA standards are outdated and that the soil auger borings, taken by its own experts, should be regarded as more persuasive of the soils' irrigability. *See* Four Tribes' Post-Trial Reply Brief 48 (May 1981). *See also* C.R. Exh. 50. I find this rejoinder of the Tribe to be unpersuasive given that the original purpose of these soils samples taken by its experts was to "supplement" the soils information available through the BIA land classification. F.M. Exh. 2, at 21-22. Moreover, the Tribe's primary expert witness almost completely disqualified his firm from making any soils classification judgments. *See* Tr. 1250.

claim made by the United States. Those lands claimed solely by the Tribe are:

Unit	Gross Acres	Annual Water Cost/Acre
FM-1	512	$51
FM-107	55	$51
FM-114	50	$89
FM-115	112	$116
FM-116	253	$125
FM-119	195	$144
	1177[299]	

In addition, the Tribe asserts a 95 gross acre claim based on permanent crops for the unit called Quail Hollow for which the United States advanced an unsuccessful claim. Together these claims amount to a claim for 1,272 additional gross acres, while the total acreage for which water rights are requested on the Fort Mojave Reservation projected for permanent crops amounts to 2,728 gross acres.[300] I need not consider what crops may be actually planted on the other acres which overlap the United States claims. Almost the entire claim for almonds (455 gross acres)[301] and for grapes (909 gross acres)[302] may be planted on these additional lands which total 1,272 gross acres. The payment capacity for almonds is $347 and the payment capacity for grapes greatly exceeds any of the annual water costs figures stated above. Thus, the entire almonds claim may be economically planted in the sandy lands of FM-1 and the remainder of the lands may be economically planted in grapes, before the en-

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299. *See* C.R. Exh. 50; F.M. Exh. 2, Table 9 app. A, Plate No. 2.
300 *See* F.M. Exh. 2, at 26-27.
301. *See* F.M. Exh. 2, at 26-27, Table C-12; C.R. Exh. 57 n.3.
302. *See* F.M. Exh. 2, at 26-27.

tire acreage projected for grapes is exhausted. The Tribe's claims may therefore be sustained at this point without breaking the projected cropping pattern.

Of course, within these units, I have found 305 non-irrigable or non-arable acres.[303] Thus, the water rights granted on the basis of a claim regarding permanent crops should be reduced by that amount in the final analysis.

The Tribe's claims may be sustained depending upon a comparison of economic costs and benefits. Parcels to be included in such an analysis should be parcels claimed solely by the Tribe (totalling 1,739 gross acres), as well as for the Quail Hollow Unit (95 gross acres) for which the United States claim was unsuccessful. In table form these claims[304] would be:

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303. *See* notes 294-98 and accompanying text *supra*. This finding concerned Units FM-114, 115, 116, and 119.

304. The figures in this table may be derived from F.M. Exh. 2, Table 12, apps. C, D, Plate Nos. 1, 2; F.M. Supp. Exh. (Sept. 1981), record item no. 192; S.P. Exh. 147; note 100 and accompanying text *supra*.

Unit	Land Type	Annual Water Costs (per acre)	Annual Payment Capacity (per acre)	Gross Acres	Arable or Irrigable Acres	Practicably Irrigable Gross Acres
FM-1	Nevada Omitted	$51	$347+	512	512	512
FM-105	Calif. Omitted	$42	$136	97	42	42
FM-107	Nevada Omitted	$51	$347+	55	55	55
FM-114	Arizona Omitted	$89	$347+	50	45	45
FM-115	Arizona Omitted	$116	$347+	112	31	31
FM-116	Arizona Omitted	$125	$347+	253	110	110
FM-119	Arizona Omitted	$144	$347+	195	119	119
FM-126	Arizona Omitted	$72	$136	35	0	0
FM-128	Arizona Omitted	$42	$136	222	127	127
FM-129	Arizona Boundary	$42	$136	85	85	85
FM-130	Arizona Boundary	$42	$136	123	47	47
Quail Hollow	Calif. Boundary	$109	$347+	95	95	95
TOTALS				1,834	1,268	1,268

The following water rights should be added to those rights presently held by the Fort Mojave Tribe in addition to those claims successfully advanced by the United States:

	Gross Acres	Net Factor	Net Acres	Diversion Unit (A.F./ Ac.)	Total Water Diversion in A.F.
Ariz. Boundary	132	.95	125	6.46	808
Ariz. Omitted	432	.95	410	6.46	2,649
Calif. Boundary	95	.95	90	6.46	581
Calif. Omitted	42	.95	40	6.46	258
Nevada Omitted	567	.95	539	6.46	3.482
TOTAL	1,268	—	1,204	—	7,778

3. *Colorado River Indian Reservation*

(a) Arability Questions

(i) Tribes Claims

The claims presented by the Colorado River Indian Tribes meet the response from the State Parties that 1,561 gross acres are non-arable and another 175 gross acres lack adequate moisture-holding capacity. The disputed acres are:

Unit	Non-arable	Low Moisture-Holding Capacity
CR-103	375	
CR-107	776	
CR-108	163	
CR-109	247	175
Totals	1,561	175[305]

The State Parties in their briefs and through their expert's testimony described these lands as consisting of such forbidding features as "a mesa top which is extremely sandy and an escarpment with steep, strongly dissected slopes" and "series of 10-20 foot high sand dune ridges mixed with some gravelly/cobbly soils and drainage areas of steep and rough wash land."[306] Yet they conclude that 6,926 gross acres, of the 8,662 gross acres claimed to be irrigable, are in fact arable.[307] When viewed in this perspective, this dispute appears relatively minor.

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305. *See* S.P. Exhs. 148; 158T, 158U, 158V, 158W.

306. *See* State Parties' Post-Trial Opening Brief 82-93 (May 1981); Tr. 3187-200.

307. *See* S.P. Exh. 148.

Indeed for the most part, there is no real dispute at all. Although the Tribes claim that the State Parties' expert did not indicate where in the farming units he found non-arable soils,[308] a comparison of several soils maps generally reveals the location of the disputed acres. The soils experts from the United States as well as the State Parties classified the soils in the several units.[309] The resulting maps reveal a remarkable agreement between those experts regarding the arability of these soils.[310] The treatment of both units CR-103 and CR-108 is generally so identical that I find it appropriate to adopt the State Parties' figures regarding the non-arable areas included within the units simply to square off their boundaries. Thus, I find these units contain the following amounts of non-arable land:

Unit	Gross Acres
CR-103	375
CR-108	163

These acres should not receive water rights.

The State Parties' treatment of units CR-107 and CR-109 is somewhat similar to that of the United States' soils expert, but my findings regarding those parcels merit a discussion regarding each parcel.

Unit CR-107 consists of a large amount of acreage in the northeastern area of the Reservation.[311] It is a long narrow unit extending north to south. The State Parties' soils expert described it as consisting of a series of parallel sand dunes ten to twenty feet high, 100 to 200 feet wide and 600 feet apart.[312] Remarkably he

308. Four Tribes' Opening Post-Trial Brief 95-97 (May 1981).
309. *See* U.S. Exhs. 7, 8, 11, 12; C.R. Exh. 2; S.P. Exh. 52.
310. *See* exhibits cited in note 5 *supra*.
311. C.R. Exh. 2.
312. Tr. 3188-90.

found the dunes to be non-arable, but classified large areas on the unit as arable even though those areas contained the dunes.[313] The areas considered as non-arable were: 1) in the southern portion of the unit "a gravelly wash and some adjoining rough lands";[314] and 2) in the northern portion a large tract of land containing "a far more intricate pattern of much more frequently spaced dunes," of the type which this expert found elsewhere on the tract.[315] The difficulty lies not with the lands found non-arable in the southern area of this unit; to a large extent this finding is confirmed by the finding of the United States' soils expert.[316] Rather I find that the problem lies with the exclusion as non-arable of the large area in the northern end of this unit. This area was excluded because the "non-arable" dunes were more prevalent there. Yet I find unconvincing the State Parties' soils expert's explanation that the dunes are non-arable due to the problems associated with sandy soils and variable topography.[317] My rejection of that reasoning is consistent with my earlier finding regarding sandy lands and is bolstered by the finding of the United States' soils expert that this area is irrigable or arable.[318] This conclusion is further bolstered by the Tribes' presentation of a photograph of this unit.[319] That photograph shows none of the sand dunes which the State Parties' expert described as prevalent throughout this unit.[320] I find no

313. *Id.*; S.P. Exhs. 52, 148, 158U.
314. Tr. 3191; S.P. Exh. 52.
315. Tr. 3190-91; S.P. Exh. 52.
316. *Compare* U.S. Exhs. 7, 11; S.P. Exh. 52.
317. Tr. 3189.
318. *See* U.S. Exh. 11; S.P. Exh. 52.
319. C.R. Exh. 39.
320. The State Parties did introduce a photograph of a large sand dune on Unit CR-108. *See* S.P. Exh. 53. Remarkably this photograph

reason to consider this northern part of Unit CR-107 to be non-arable.

The remaining issue regarding this unit concerns the number of non-arable acres in my finding. The evidence, as I understand it, does not specifically quantify the number of acres designated non-arable by the State Parties in each respective location of this unit.[321] Rather only the total non-arable figure is given at 776 gross acres. Approximately 90% of this land was so classed because of the alleged sand dunes problem.[322] Consistency requires that I find that only 76 acres of this unit may justifiably be classed as non-arable.[323]

The remaining unit is CR-109. The State Parties claim that 247 gross acres of this unit are non-arable as part of an escarpment and the remaining 175 gross acres are sandy lands lacking in moisture-holding capacity.[324] Once again the sandy lands argument of the State Parties is rejected, and the only significant dispute thus centers on the "escarpment" lands described by the State Parties' expert:

> [t]he boundary, *as drawn*, . . . includes some of the side slopes of the mesa, which are very dissected, very strongly dissected, little or no soil material.[325]

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depicts an area classified by the State Parties' expert as arable. *See* Tr. 3192-94; S.P. Exh. 52. In addition, the Tribe also presented a photograph of the center portion of CR-108 which reveals no such lands in the same general area. *See* C.R. Exh. 39.

321. *See* S.P. Exhs. 52, 148, 158U.

322. *See* S.P. Exh. 52.

323. I recognize that this estimation breaks with my usual practice of not attempting to visually estimate the quantity of acreage in any tract. The magnitude of the acreage at issue in this one instance justifies such a limited departure.

324. *See* S.P. Exhs. 148, 158W.

325. Tr. 3200 (emphasis added).

The Tribes dispute this testimony claiming that the unit is "level and regular" and that the State Parties' expert "may have been looking at the wrong land."[326] The Tribes presented a photograph and testimony to support their position.[327] I believe that the State Parties' point is well taken on this issue. The Tribes' map of this unit appears to include a significant amount of land classified by the United States as non-irrigable or non-arable.[328] Although the Tribes' map definition of CR-109 conforms to an extent to a large sandy-arable area in sections 4 and 5 of this general area, the irrigation unit on the Tribes' map lies slightly more to the south than does this sandy area and therefore appears to include excessive non-arable land in the south while excluding arable land in the north. Under these circumstances, I accept the State Parties' estimate that 247 acres of this unit are non-arable.[329]

In conclusion, for the Colorado River Indian Reservation, I find that on the units claimed by the Tribes, the following acres are non-arable:

Unit	Gross Acres
CR-103	375
CR-107	76
CR-108	163
CR-109	247
Total	861

The remaining acres may be practicably irrigable subject to an economic analysis.

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326. Four Tribes' Post-Trial Reply Brief 52 (June 1981).

327. *See* C.R. Exh. 40; Tr. 6226-27.

328. *See* U.S. Exh. 12; C.R. Exh. 2.

329. A visual inspection tends to reveal that fewer acres are in this non-arable area in the southern edge of this unit, but absent a more precise estimate I will use the State Parties' figure.

(ii) State Parties' Argument Regarding Decreed Lands

The State Parties in the course of the hearings argued that if the omitted lands claims are heard, then they should be allowed to dispute the irrigability of Reservation lands with decreed water rights. They produced evidence supporting such a claim regarding approximately 1,200 to 1,600 acres on the Colorado River Indian Reservation.[330] The State Parties' expert described his examination of these lands as a "rough look"[331] and stated that the 1,200 to 1,600 acres resulted when he "just made a figure out of the air."[332] Even absent contradictory evidence,[333] no one would be persuaded by the testimony of the State Parties' soils expert on this issue. I find that none of the disputed decreed lands should be considered non-irrigable.

(b) Conclusions Regarding Practicable Irrigability of Colorado River Indian Reservations Lands

A brief analysis will determine the additional water rights on the Colorado River Indian Reservation. The analysis must differ somewhat in that, of the four permanent crops projected by the Tribes' expert, only almonds and grapes have been shown to be economically feasible on the irrigation units added by the Tribes' claim. The permanent crops were projected for 8,662 gross acres on Units CR-103, CR-107, CR-108, CR-

330. *See* S.P. Exh. 26, at II-10, -12.
331. Tr. 3091.
332. Tr. 3392.
333. *See* Tr. 6228-36; C.R. Exh. 41.

109.[334] The water costs projected by the Tribes for the acres in the respective units are as follows:

Unit	Gross Acres	Annual Water Cost per Acre
CR-103	3,960	$262
CR-107	3,200	$227
CR-108	1,080	$320
CR-109	422	$179[335]

My findings show that of the four permanent crops in evidence almonds and grapes produce greater revenue than costs per acre.[336] The Tribes' initial projected cropping pattern, however, included only one-half the acreage in such crops.[337] The Tribes anticipated this possibility and argued in their brief that they would concentrate plantings in crops found to be economically viable.[338] For present purposes, I believe that response is sufficient. The State Parties responded to a similar argument by the Quechan Tribe by arguing that large plantings of any one crop would ruin the market for the crop.[339] As I indicated earlier,[340] no evidence of any study reaching this conclusion was presented even if the issue is relevant to present proceedings. The lands may be proved to be practicably irrigable on the basis of their ability to support any crop, but the Tribes might ultimately cultivate on these lands a variety of crops or none at all. Therefore,

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334. *See* C.R. Exh. 1, at 31-33, app. C; C.R. Exhs. 2, 50.
335. *See* C.R. Exh. 1, at 31; C.R. Exhs. 2, 50.
336. *See* notes 5-186 and accompanying text *supra*.
337. *See* C.R. Exh. 1, at 26.
338. Four Tribes' Post-Trial Opening Brief 94 (May 1981).
339. State Parties' Post-Trial Closing Brief 42 (June 1981). *See* State Parties' Post-Trial Opening Brief 213-14 (May 1981).
340. *See* notes 178-83 and accompanying text *supra*.

I must now consider the number of acres which may be found to be practicably irrigable on this basis.

The Tribes' claims may be sustained upon a comparison of economic costs and benefits for the irrigable lands in the irrigation units. In table form, the claims asserted only by the Tribes[341] are:

Unit	Land Type	Annual Water Costs (per acre)	Annual Payment Capacity[342] (per acre)	Gross Acres	Arable or Irrigable Acres	Practicably Irrigable Gross Acres
CR-103	Arizona Omitted	$262	$347+	3,960	3,585	3,585
CR-107	Arizona Omitted	$227	$347+	3,200	3,124	3,124
CR-108	Arizona Omitted	$320	$347+	1,080	917	917
CR-109	Arizona Omitted	$179	$347+	422	175	175
			Totals	8,662	7,801	7,801

The following water rights, in addition to those awarded based on the United States claims, should be added to those presently decreed appurtenant to the Colorado River Indian Reservation:

	Gross Acres	Net Factor	Net Acres	Diversion Unit (AF)	Total Water Diversion in AF
Arizona Omitted Lands	7,801	.95	7,411	6.67	49,431

4. *Chemehuevi Indian Reservation*

(a) Arability Questions

The State Parties argue that 1,150 acres of Unit CH-100 claimed by the Chemehuevi Tribe as irrigable

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341. C.R. Exhs. 1, 2, 50; Four Tribes' Post-Trial Opening Brief 92 (May 1981).

342. *See* notes 100 & 185 and accompanying text *supra*.

are, in fact, non-arable as proved by soils classification work done by the State Parties' soils expert.[343] The Tribe disputes this assertion.[344]

The State Parties' position is substantially supported by the findings of the United States' soils expert.[345] Although there are minor differences between these experts, this concurrence of opinion is persuasive, and I adopt the State Parties' estimate that 1,150 acres in Unit CH-100 are non-arable and, therefore, cannot be practicably irrigable.[346]

(b) Gross-to-Net Acreage Reduction

The Chemehuevi Tribe argues in its brief that its lands merit a different gross to net acreage reduction percentage, because there will be fewer nonagricultural, but related, uses of lands in the Chemehuevi irrigation units.[347] The United States' experts used a 2%

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343. *See* S.P. Exhs. 140, 149, 158Z.

344. *See* Four Tribes' Post-Trial Opening Brief 83-84 (May 1981).

345. *Compare* S.P. Exh. 140; U.S. Exh. 5; CH. Exh. 2.

346. I have previously noted my belief that the work of United States' soils expert represents a truly reliable set of findings which are instructive in the event of a major dispute. As I did in considering the soils of the Fort Mojave Reservation, I do now find that his opinion is more effectively and convincingly presented than the soils work done by the Tribe's experts. *See* notes 263-65 and Part Two at I. B. & C. *supra*; CH. Exh. 1, Table A-1.

The Tribe also cites numerous photographs of portions of this unit, CH-100, apparently to demonstrate the good quality of this land. *See* CH. Exh. 19. Their value is minimal because they generally depict land that was classified as arable or irrigable by the United States' soils expert. *See* U.S. Exh. 5 and map accompanying CH. Exh. 19. These areas lie very near, if not within, the arable area mapped by the State Parties' expert. *See* S.P. Exh. 140. I find more relevant the pictures offered by the State Parties of lands which are clearly within the disputed area. *See* S.P. Exhs. 136, 137, 138, 140; Tr. 5123.

347. Four Tribes' Post-Trial Opening Brief 85-86 (May 1981).

figure for the Chemehuevi Reservation,[348] while the Tribe's expert used a 5% figure.[349] Because the State Parties also used a basic 5% figure,[350] in connection with the United States claims I found that figure to be well-supported by the concurrence of two out of three experts. I do not hold that the Tribe is bound by its expert's opinion evidence, but I find the abandonment in the brief of that expert's position to be curious. The general 5% reduction percentage still appears most persuasive.[351]

(c) Conclusions Regarding Practicable Irrigability of Chemehuevi Indian Reservation Lands

The Chemehuevi Tribe has advanced a claim for 1,770 gross acres beyond the claim made by the United States.[352] The land and its water costs have been summarized[353] as follows:

Unit	Gross Acres	Annual Water Cost per Acre
CH-100	1,770	$171

The Tribe projected 2,463 net acres to be planted in almonds and grapes, and I have determined that only 620 gross acres of Unit CH-100 are arable or irriga-

348. Tr. 521-23; U.S. Exh. 42.

349. Tr. 1127; CH. Exh. 1, Table 14.

350. Tr. 4098. This basic figure was increased to 6% for reasons I earlier considered unpersuasive.

351. Indeed because the United States did not claim the Unit CH-100, I doubt that there is evidence supporting the position that the 2% reduction applies to that land.

352. CH. Exh. 1, Table 8.

353. *See, id.*, at Table 11; CH. Exh. 2.

ble.[354] Therefore, the almonds and grapes within the cropping pattern might cover the entire amount of irrigable land.[355]

The Tribe's claim may be sustained upon a comparison of economic costs and benefits. In table form the claim asserted by the Tribe[356] is:

Unit	Land Type	Annual Water Cost (per acre)	Annual Payment Capacity (per acre)	Gross Acres	Arable or Irrigable Acres	Practicably Irrigable Acres
CH-100	California Omitted	$171	$347+	1,770	620	620

The following water rights should be added to those presently decreed appurtenant to the Chemehuevi Indian Reservation:

	Gross Acres	Net Factor	Net Acres	Diversion Unit (AF)	Total Water Diversion (AF)
California Omitted Lands	620	.95	589	5.97	3,516

354. *See* Part One at VI *supra*.

355. In addition, my findings regarding these crops could reinforce my findings relating to the United States claims on this Reservation. *See* notes 99-103 and accompanying text *supra*. The water costs for the United States claims amount to between $82 and $116 per acre per year according to the Tribe's expert. CH. Exh. 1, Table 11. The payment capacity for almonds and grapes exceeds those figures and as both are a permanent crop this claim regarding almonds and grapes on the lands claimed by the United States answers the State Parties' objections that this land is suitable only for permanent crops. Of course, to fully cover the United States claim with only two crops, the cropping pattern must be broken, but that possibility is not an insurmountable obstacle.

356. *See* CH. Exhs. 1, 2; CH. Supp. Exh. (Sept. 1981), record item no. 190; Part One at V *supra*.

PART THREE

Recommended Decree

It is ORDERED, ADJUDGED AND DECREED THAT Article II(D)(1)-(5) of the Decree in this case entered on March 9, 1964, is hereby amended to read as follows:

(1) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 21,017 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 3,521 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907;

(2) The Cocopah Indian Reservation in annual quantities not to exceed (i) 10,197 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,601 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 27, 1917, for lands reserved by the Executive Order of said date; June 24, 1974, for lands reserved by the Act of June 24, 1974 (88 Stat. 266, 269);

(3) The Fort Yuma Indian Reservation in annual quantities not to exceed (i) 130,135 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 19,515 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of January 9, 1884;

(4) The Colorado River Indian Reservation in annual quantities not to exceed (i) 902,207 acre-feet of diversions from the mainstream or

(ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 135,333 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1865, for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date except as later modified; May 15, 1876, for lands reserved by the Executive Order of said date; November 22, 1915, for lands reserved by the Executive Order of said date;

(5) The Fort Mojave Indian Reservation in annual quantities not to exceed (i) 158,928 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 24,590 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, and subject to the next succeeding proviso, with priority dates of September 19, 1890, for lands transferred by the Executive Order of said date; February 2, 1911, for lands reserved by the Executive Order of said date; provided that the quantities fixed in this paragraph shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the Reservation are finally determined.

Provided, further, that lands presently determined, for the purpose of this order, to be within the boundaries of the above-named Reservations and which have been or are later conveyed or patented to non-Indians or that lands presently determined for this purpose to be within the boundaries of the above-named Reservations and later determined to be outside the boundaries of the above-named Reservations, as well as any accretions thereto to which the own-

ers of such land may be entitled, should not be included as irrigable acreage within the Reservations and that the above specified diversion requirements of such land that is irrigable shall be reduced by the unit diversion quantities listed in the Decree in this case entered on January 9, 1979 (439 U.S. at 422).

This Report, together with the Findings of Fact and Conclusions of Law therein contained, and the recommended decree thereto annexed are

Respectfully submitted,

ELBERT P. TUTTLE
Special Master

Atlanta, Georgia
February 22, 1982

Elbert P. Tuttle

APPENDIX 1

Indian Reservation Boundary Determinations

[SEAL]

UNITED STATES DEPARTMENT of the INTERIOR

Office of the Secretary
Washington, D.C. 20240

June 3, 1974

Memorandum

To: Director, Bureau of Land Management
Through: Assistant Secretary, Land and Water Resources

From: Secretary of the Interior

Subject: Western Boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation, Arizona, California and Nevada

I have this date received a memorandum from the Solicitor regarding the proper location of the western boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation. A copy of his memorandum is attached.

Acting upon the conclusions expressed in the Solicitor's memorandum, I have determined that the 1928 resurvey conducted by Sidney Blout under direction of the General Land Office, and the plat representing that resurvey of the above-mentioned western boundary of the Hay and Wood Reserve, approved November 15, 1930, and accepted on January 23, 1931, should be declared null and void and to have no further force or effect.

The western boundary of the "Camp Mojave Reservation for Hay and Wood" is most accurately determined and established in accordance with the intent of the original survey by using the courses, distances and acreage as

described in the plats and notes of survey accompanying the Executive Order of March 30, 1870. I reject as erroneous those portions of that description which make reference to posts "marked U.S. in a mound of earth near the left bank of the Colorado River" used in connection with Corner III and Corner IV appearing on the plat and in the notes of survey accompanying the above mentioned Executive Order of March 30, 1870.

Please take all such actions as may be appropriate to implement the conclusions herein stated, including declaring null and void the above-mentioned 1928 resurvey and the plat respecting that resurvey of the western boundary of the Hay and Wood Reserve accepted January 23, 1931, and resurveying the Reserve to conform to the acreage description of 9114.81 acres. Correct Corner III and Corner IV should be reestablished in accordance with the courses and distances described in the plats and notes of the survey accompanying Executive Order of March 30, 1870, to replace the erroneous and rejected Corner III and Corner IV established by the 1928 resurvey.

It is also requested that a determination be made as to what third-party interests may have been established and that appropriate action be taken to subrogate such interests to the Fort Mojave Tribe in those instances in which it is determined that such third-party interests affect the lands inside the now recognized western boundary of the reservation.

Please note the official records accordingly so that henceforth such records will indicate the proper location of the western boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation in the subject area.

/s/ Rogers C. B. Morton

Fort Mojave
LaFollette Tract

LAW OFFICES OF
RAYMOND C. SIMPSON
2712 Via Campesina
Palos Verdes Estates, California 90274

Telephone (213) 373-8592

Attorney for Plaintiff

FILED

FEB 7 1977

W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

THE FORT MOJAVE TRIBE by and through its TRIBAL COUNCIL, Plaintiff, vs. WILLIAM L. LAFOLLETTE and SUSAN H. LAFOLLETTE, his wife; CLESSON W. KERR and LEONA W. KERR, his wife, et al., Defendants.	NO. CIV 69-324 MR DECREE QUIETING TITLE

On September 26, 1974 a Stipulation for settlement of the above entitled cause was submitted to this Court which was thereafter approved on October 22, 1974. Subsequently the settlement Stipulation was implemented by adding parties upon whom service had not previously been made, and by having other adverse claimants of record execute Quit Claim Deeds in favor of plaintiff, thereby relinquishing forever all of their right, title and interest in any of the lands comprising the subject matter of this action.

GOOD CAUSE APPEARING therefore and the Court being fully advised in the premises, and having retained jurisdiction thereof.

NOW, THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the allegations of ownership set forth in plaintiff's complaint are true, and that the hereinafter described real property which is the subject matter involved in this proceeding is a part of the Fort Mojave Indian Reservation with title thereto held in trust by the United States of America for the

benefit of the Fort Mojave Tribe, to wit:

Those portions of Section 4, T. 17 N., R. 22 W., and of Sections 33 and 34, T. 18 N., R. 22 W., G & S. R. B. & M., Mohave County, Arizona, along with those portions of Sections 1 and 12, T. 9 N., R. 22 E., and of Sections 6 and 7, T. 9 N., R. 23 E., San Bernardino Meridian, California, more particularly described as follows:

Beginning at the southeast corner of said Section 33; thence westerly along the south line of said Section 33 approximately 2,650 feet to its intersection with the 1905 GLO meander line; thence southerly along said 1905 GLO meander line to its intersection with the 1883 GLO meander line; thence southerly along said 1883 GLO meander line to its intersection with the south line of said Section 7; thence westerly along the south lines of said Sections 7 & 12 approximately 3,500 feet to the east bank of the present Bureau of Reclamation channel; thence northerly along said east bank of the present Bureau of Reclamation channel approximately 10,800 feet to its intersection with the easterly prolongation of the north line of said Section 1; thence easterly along said easterly prolongation of the north line of Section 1 and the westerly prolongation of said section 34 approximately 5,100 feet to the centerline of the 1912 channel of the Colorado River as surveyed by the Indian Service; thence along said centerline in a southerly direction to its intersection with the south line of Section 34; thence westerly along said south line approximately 400 feet to the southeast corner of Section 33 and the point of beginning.

The total area covered by the above legal description is graphically depicted on Exhibit "1" attached hereto and by reference made a part hereof.

IT IS FU[illegible]ER ORDERED, ADJUDGED AND DECREED that the named defenda[illegible]rein, and all the hereinafter named persons who during the pendency of [illegible] cause have executed special agreements in writing or Quit Claim Deeds in favor of the Fort Mojave Tribe, have no estate, title, lien, claim or possessory interest whatsoever in or to the above described property or in or to any part thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said title of said plaintiff to the said property and to each and every part or parcel thereof be, and the same is hereby declared to be good and valid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the following named persons and corporations be and they are hereafter forever and perpetually enjoined, restrained and debarred from asserting any estate, right, title, lien, claim or possessory interest in or to said real property, or any part thereof, adverse to plaintiff, and that said title thereto be, and it is hereby established and quieted in favor of plaintiff and against all of the following named persons and coporations:

Clesson W. Kerr and Leona M. Kerr, husband and wife,

John L. Thomas and Leohrah M. Thomas, husband and wife,

Michael P. Wiley and Dilio M. Wiley, husband and wife,

George C. Rasmussen and Jane Doe Rasmussen, husband and wife,

I. A. Hammer,

Arthur B. Sanford and Genevieve B. Sanford, husband and wife,

David Freidenrich and Edith S. Freidenrich, husband and wife,

Helene M. Reynolds, a single woman,

Alice Marguerite Reynolds, a widow,

Charles D. Reed and Blance D. Reed, husband and wife,

The Estate of Zoe Ackerman,

The Estate of Brenda Ackerman,

Colorado River Ranchos, Inc.,

June Knapp,

Cal Nev Ari Corporation,

Frank B. McShan and Maggie L. McShan, husband and wife,

Roy B. Stephens,

Henry Olson,

Monaghan & Murphy Company,

Robert M. Castle and Mary Castle,

Fred H. Almy and Barbara C. Almy,

William LaFollette and Susanne H. LaFollette, husband and wife.

DONE IN OPEN COURT this 2nd day of July, 1976.

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FILED

MAY 1 2 1975

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

COCOPAH TRIBE OF INDIANS, Plaintiff, vs. ROGERS C. B. MORTON, Secretary of the Interior of the United States of America, Defendant.	NO. CIV-70-573-PHX-WEC FINAL JUDGMENT

This Court granted the motion for summary judgment of plaintiff, the Cocopah Tribe of Indians (hereinafter "the Tribe"), on September 24, 1973. The Tribe was represented by one of its attorneys, Joe P. Sparks. The defendant, Rogers C. B. Morton, as Secretary of the Interior of the United States of America (hereafter "the Secretary"), was represented by the United States Attorney, Richard S. Allemann, Assistant United States Attorney. The Court has reviewed the entire file in this action, as well as the stipulation of counsel that this judgment be executed by the Court.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND DECLARED AS FOLLOWS:

1. The Cocopah Indian Reservation, as established

by the Executive Order of September 17, 1917, was and is riparian to the Colorado River and includes any land added to its boundaries by accretion from shifts in the course of the River subsequent to said date.

2. The Secretary, in his capacity as agent and officer of the United States of America charged with fulfilling the trust obligations of the United States to the Tribe, holds lands added by accretion to the boundaries of the Cocopah Indian Reservation in trust for the exclusive use and occupancy of the Tribe, such lands being more particularly described as follows:

"Township 9 south, Range 25 west of the Gila and Salt River Meridian, Arizona:

Section 25

Lots 9, 10, 11, 12, 13, 14, 15, 16, 17, 24, 25, 26, 27, 28 and that portion of lot 29 lying north of a westerly extension of the south line of lot 17;

Section 26

Lots 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11;

Section 27

Lots 1 and 2

containing 883.53 acres more or less, plus all accretion to the above described lands.

Excepting from said exclusive use and occupancy by the Tribe, the rights reserved by Presidential Proclamation of May 27, 1907 (35 Stat. 2136) and the rights of the United States of America in its general proprietary and governmental capacity to the non-exclusive use of the lands, as described on drawings Nos. 423-303-1968, 423-303-1969 and 423-303-1972, attached hereto and designated as Exhibit A, for the sole purpose of maintaining and using two existing levees and existing railroad facilities located on said lands. The correlative rights of the United States of America

and the Tribe with respect to the lands described in Exhibit A, apart from those rights arising out of the reservation status of these lands, shall be governed by the law applicable to the dominant and servient estates respectively in the case of easements, the Tribe and its members having the right to use and occupy said lands in any manner and for any purpose authorized by law which does not prevent or interfere with the rights of the United States of America to maintain and use said levees and railroad facilities. Such use and occupany by the Tribe shall include, but shall not be limited to, agricultural use."

3. The court declares that the Tribe and its members are entitled to occupy, use and enjoy lands added by accretion to the boundaries of the Cocopah Indian Reservation, such lands being more specifically described in paragraph No. 2, above, to the same extent and manner as they are entitled to the use and occupancy of other lands included within the boundaries of the Reservation.

4. The "Yuma Valley Levee", as described in relevant part in the attached Exhibit A, was constructed by the Secretary in approximately 1950. Part of the Yuma Valley Levee was constructed on the accretion land described in Section 2, above. The tribe has received no payments or compensation from the United States or anyone else for the use and occupancy by persons other than the tribe or its members of those lands described in Section 2 above.

Dated this 12th day of May, 1975.

United States District Judge

Colorado River
Benson Line & Riverside Mountain

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JAN 17 1959

Memorandum

To: Director, Bureau of Land Management
Through: Assistant Secretary, Public Land Management

From: Secretary of the Interior

Subject: Western boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, California, through section 12, T. 5 S., R. 23 E., S.B.M., California

I have this date received a memorandum from the Solicitor regarding the proper location of the boundary of the Colorado River Indian Reservation in the subject reach. A copy of his memorandum is attached. Acting upon the conclusions expressed in the memorandum, I have determined that certain surveys of record in your Bureau should be suspended and other surveys reinstated so as to correctly show the interest of the Colorado River Indian Tribes in certain lands.

The presently monumented boundary of the reservation in the reach between Riverside Mountain and the Colorado River is shown on the plat of survey for T. 2 S., R. 23 E., S.B.M., approved November 20, 1913. I have concluded that this survey did not correctly locate the boundary line in this reach because it did not conform to the call of the Executive Order of May 15, 1876, that the boundary should be a direct line from the top of Riverside Mountain, California, toward the place of beginning to the west bank of the Colorado River. I have determined that the above-mentioned plat of survey should be suspended. The proper position of the reservation boundary should be a line from the highest point on Riverside Mountain to the meander corner common to fractional sections 25 and 36, T. 2 S., R. 23 E., S.B.M., as shown on the plat of survey of this township approved May 22, 1879, and reestablished by the dependent resurvey of the same township reflected on the plat of survey accepted July 22, 1958.

I have also determined that the proper location of the reservation boundary from section 25, T. 2 S., R. 23 E., S.B.M., through section 12, T. 5 S., R. 23 E., S.B.M., is along the meander lines shown on the plats of survey in Tps. 2, 3 and 4 S., R. 23 E., S.B.M., approved May 22, 1879, and T. 5 S., R. 23 E., S.B.M., approved December 28, 1874, all as reestablished by the dependent resurvey of these townships reflected on the plats of survey accepted July 22, 1958.

In 1961, accretion surveys of lands now lying between the aforementioned meander lines of 1874 and 1879 and the west bank of the Colorado River were undertaken in Tps. 3 and 4 S., R. 23 E., S.B.M., and T. 5 S., Rs. 23 and 24 E., S.B.M. Plats thereof were accepted on May 21, 1962. By your letter of January 27, 1964, to the State Director at Sacramento, California, you ordered that the plats of survey in Tps. 3 and 4 S., R. 23 E., S.B.M., be suspended as to the sections 36 in those townships. Thereafter, correction surveys of those sections 36 were undertaken which apportioned to them certain accretion lands. Plats of these correction surveys were accepted on October 28, 1964.

In light of the conclusion that the reservation boundary in the subject reach is along the meander lines established in 1874 and 1879, accretions to this boundary are lands of the United States held in trust for the Colorado River Indian Tribes. Thus the correction surveys, accepted October 28, 1964, apportioning accretion lands to the sections 36 are incorrect and should be suspended. Also the 1962 accretion surveys in Tps. 3 and 4 S., R. 23 E., S.B.M., should be reinstated in their entirety.

Please take such action as may be appropriate to reflect the conclusions herein stated, including suspension and reinstatement of plats. Also please note the official records accordingly so that henceforth such records will indicate the proper location of the boundary of the Colorado River Indian Reservation in the subject

Signed by Steward Udall

Attachment

Fort Yuma Ceded Lands

Office of the Secretary

Quechan Indian Reservation Boundaries; Secretarial Determination and Directives

AGENCY: Department of the Interior.

ACTION: Notice of secretarial determination and directives.

SUMMARY: This is a notice of the determination by the Secretary of the Interior of the boundaries of the Fort Yuma, Quechan Indian Reservation and directives necessitated by that determination.

EFFECTIVE DATE: February 6, 1981.

FOR FURTHER INFORMATION CONTACT: Paul Truesdell, Bureau of Indian Affairs, Trust Protection Unit, Department of the Interior, Room 704, 3030 North Central Avenue, Phoenix, Arizona 85013. Telephone: 241–2310.

SUPPLEMENTARY INFORMATION: On December 20, 1978, the Secretary of the Interior issued a Secretarial decision recognizing the 1884 Executive Order boundary of the Fort Yuma Indian Reservation as modified by the Executive Order of December 19, 1900, as the present reservation boundary. That decision provided for the protection of third-party rights on the Reservation. When the decision was published, a complete list of third-party rights had not been compiled. Third parties were notified and requested to submit claims for valid existing rights. A complete list has now been compiled. The Department of the Interior is, therefore, publishing this Notification of Secretarial Determination and Directives in final form.

Note.—The Department of the Interior has determined that this Notice does not constitute a major federal action significantly affecting the quality of the human environment.

James G. Watt,

Secretary of the Interior.

Secretarial Determination and Directives

Subject: Quechan Indian Reservation Boundaries.

Sec. 1. Solicitor's Opinion

On December 20, 1978 the Solicitor signed an Opinion recognizing that the 1884 Executive Order boundary of the Fort Yuma Indian Reservation, as modified by the Executive Order of December 19, 1900, which revoked the portion of the reservation lying south of the Colorado River in the then Territory of Arizona, still remains the reservation boundary. Said Opinion was approved by the Secretary of the Interior on December 20, 1978. A map entitled "Fort Yuma Indian Reservation 1884–1974, revised September 1974 S.D.T.," depicting the general location of the Reservation boundary today is on file in the office of the Area Director, Arizona Bank Building, 3030 N. Central Avenue, Phoenix, Arizona 85013. The exact location of the Reservation boundary shall be determined hereafter by survey in accordance with the boundaries recognized by this Notice of Secretarial Determination and Directives (Notice).

Sec. 2. Recognition of Trust Status of Lands

Except as hereinafter stated, all lands which prior to December 20, 1978, were managed under the jurisdiction of the Bureau of Land Management or the Bureau of Reclamation [1] and which the map referrd to in Section 1 indicates are within the Fort Yuma Indian Reservation (hereafter referred to as "such lands") are hereby recognized as being held in trust by the United States for the Quechan Tribe of the Fort Yuma Indian Reservation as of January 9, 1884.

Sec. 3. Exceptions and Conditions

The Solicitor's Opinion holds that an 1893 Agreement ratified by an 1894 statute providing for allotment of certain lands on the Fort Yuma Reservation and cession to the United States of other reservation lands was subject to conditions that were never carried out. Although the Solicitor's Opinion holds

[1] In order to maintain consistency with the Secretarial order of December 20, 1978, the Water and Power Resources Services is referred to as the Bureau of Reclamation throughout this notice.

that the cession provided for in the Agreement and statute did not take place, and that Reservation lands which would have been ceded in that statute and which were not later taken pursuant to the 1904 statute, remain in tribal ownership, the Solicitor's Opinion also holds that (1) pursuant to statutes predating 1884, certain valid rights were acquired by third parties that are protected by the Executive Order; (2) pursuant to later statutes, various Reclamation project works were validly constructed on the Reservation; and (3) other valid grants and grants which would have been valid had the lands been public lands were made by agencies of the United States to third parties. Accordingly, reaffirmation and recognition of the Tribe's title in such lands is subject to the exceptions and conditions set forth in this Section 3.

a. There is hereby excepted from the provisions and effect of Section 2 herein all rights of third parties created by or pursuant to Acts of Congress including but not limited to the Act of July 26, 1866, 14 Stat. 289, and the Act of March 3, 1871, 16 Stat. 573, and predating the Executive Order establishing the Reservation in 1884.

b. All rights of third parties to such lands within the now-recognized reservation boundaries which were established pursuant to law prior to December 20, 1978, including but not limited to existing permits, leases, rights-of-way and other non-fee rights and interests, including those generally described in subparagraphs (1)-(44) following (and more particularly described in the cited instruments):

(1) LBR Contracts Nos. 14-06-303-3730, -3737, -3738, -3739, -3740, -3741, -3742, -3743, -3744, -3745, -3746 and -3747, all dated January 1, 1977, consisting of leases for agricultural purposes to various individuals and corporations.

(2) LBR Contract No. 7-07-34-L0028 dated April 15, 1977, issued to Ned Foss for livestock grazing and feeding purposes.

(3) Bureau of Land Management Agricultural Permits, BLM Serial Nos. 1C-1(A), 1C-2(A), 1C-3(A), 1C-5(A), 2C-3(A), 2C-4(A), 2C-5(A), 2C-6(A), 2C-9(A), 2C-14(A), 2C-15(A), 2C-32(A), 2C-35(A), 2C-37(A).

(4) Bureau of Land Management Temporary Residential Permits, BLM Serial Nos. 1C-9(R), 2C-38(R), 2C-41(R), 2C-42(R), 2C-43(R), 2C-44(R), 2C-45(R), 2C-46(R), 2C-48(R), 2C-51(R), 2C-58(R), 2C-CM-4(R), 2C-CM-5(R), 2C-LD-5.

(5) LBR Contract No. 14-06-300-960 issued to California Electric and Power Company on October 8, 1959, for a transmission line.

(6) LBR Contract No. 14-06-303-1330, executed December 5, 1957, and 14-06-303-1412, executed May 9, 1958, consisting of licenses issued to the Pacific Telephone and Telegraph Company for telephone and telegraph line rights-of-way within and across Bureau of Reclamation levee and canal rights-of-way.

(7) LBR unnumbered contract issued April 3, 1961, for an indefinite period, consisting of license issued to Pacific Telephone and Telegraph for a public phone booth.

(8) LBR Contract Nos. 14-06-303-1119, -1120, -1122, executed July 3, 1956, consisting of licenses issued to Southern Pacific Pipelines, Inc., for a petroleum products pipeline right-of-way within and across Bureau of Reclamation canal lateral and drain rights-of-way.

(9) LBR Contract Nos. I-24-R-635, I-24-R-678, dated June 4, 1951, issued to Imperial County for the removal of sand, gravel and road materials.

(10) LBR No. 7-07-34-L0068, dated September 21, 1977, consisting of a license issued to the County of Imperial, California, for a refuse disposal dump.

(11) LBR Contract No. 14-06-300-2283, issued to the State of Arizona for fish and wildlife management at Mittery Lake.

(12) LBR No. 14-06-303-3748, dated January 1, 1977, consisting of a lease to Gladys Reynolds, for a mobile home park.

(13) BLM Permit No. R03272 for a right-of-way for Upper and Lower Reservation levees, issued May 31, 1963, pursuant to § 4(p) of the Act of December 5, 1924 (43 Stat. 7042; 43 U.S.C. § 417).

(14) BLM Permit No. R1278 for a right-

of-way for a drainage ditch, issued December 19, 1968, pursuant to § 4(p) of the Act of December 5, 1924 (43 Stat. 704).

(15) BLM Serial No. R05051 right-of-way as specified in BLM decision of August 25, 1964, for a transmission line.

(16) BLM Permit No. LA077775 for a right-of-way for the All-American Canal including appurtenant structures and operating telephone line, issued pursuant to § 4(p) of the Act of December 5, 1924 (43 Stat. 704; 43 U.S.C. § 417).

(17) BLM Permit No. LA055165 for a right-of-way for "Gila drop #4" power transmission line and access road, approved July 23, 1942, pursuant to Act of December 5, 1924 (43 Stat. 672); amended May 19, 1971.

(18) BLM Permit Nos. 732756KELV, 75022–07 and 12271–22 issued to various denominations as mission sites by Departmental Authority of June 8, 1921.

(19) BLM Serial No. LA0164553, right-of-way grant to Imperial Irrigation District, as specified in BLM decision of August 13, 1964, for an electrical transmission line.

(20) BLM Serial No. R2331, right-of-way granted to the California Division of Highways, as specified in BLM decision of June 2, 1970, as amended April 25, 1973, and May 29, 1975, for Interstate Route 8.

(21) BLM Serial No. LA0153552, right-of-way granted to Southern Pacific Pipe Lines, Inc., as specified in BLM decision of December 16, 1930, for a highway.

(22) BLM Serial No. LA0164552, right-of-way grant to the Imperial Irrigation District, as specified in BLM decision of November 10, 1960, as amended December 5, 1960, for an electric transmission line.

(23) BLM Serial No. S3484, right-of-way grant to the Southern Pacific Transportation Company, approved February 10, 1910.

(24) BLM Serial No. S3488, right-of-way grant to the Southern Pacific Railroad, approved December 18, 1928, for station grounds.

(25) BLM Serial No. S3450, right-of-way grant to the Southern Pacific Railroad, approved June 18, 1907.

(26) BLM Serial No. S3441, amended right-of-way grant to the California Highway Commission approved October 10, 1927, for a highway.

(27) BLM Serial No. R2704, right-of-way granted to the Supervisors of Imperial County and the State of California, approved on October 24, 1930, noted in General Land Office letter 1390492 "F" IIIC of December 16, 1930, for a highway.

(28) BLM Serial No. S3430, right-of-way granted to Southern Pacific Railroad Company by the Act of March 3, 1871, 16 Stat. 573, and confirmed by Section 17 of the Act of August 15, 1894, 28 Stat. 335, for a railroad.

(29) BLM Serial No. R0329, right-of-way grant to the Imperial Irrigation District, as specified in BLM decision of April 9, 1962, for Imperial Laguna Drain No. 2.

(30) BLM Serial No. S3490, right-of-way, approved August 12, 1926, under Act of April 21, 1904 (33 Stat. 224), for transmission line.

(31) BLM Serial No. LA050409, right-of-way, approved July 26, 1932, to the California Highway Commission for relocation of an irrigation canal.

(32) BLM Serial No. CA2720, right-of-way, issued August 1, 1975, to the Imperial Irrigation district for electric distribution line.

(33) BLM Serial No. LA051577, right-of-way, approved March 15, 1934, to the Southern California Telephone and Telegraph Company for a telephone line.

(34) BLM Serial No. R01909, right-of-way, approved October 12, 1955, under Act of February 4, 1948, 25 CFR 256, for Drain Line No. 9.

(35) BLM Serial No. R551, right-of-way, noted on April 17, 1967, under Act of December 5, 1924 (43 Stat. 704; 43 U.S.C. § 417), for Upper Reservation Levee, as amended February 28, 1973.

(36) BLM Serial No. LA039464, approved August 24, 1939, to Imperial Irrigation District for a power transmission facility.

(37) BLM Serial No. R137, right-of-way grant to the State of California, Division of Highways, approved by decision of February 7, 1968, for Interstate Highway 8.

(38) LBR Contract Nos. 14-06-303-623, executed April 16, 1954, and 14-06-303-1435, executed August 18, 1958, consisting of easements granted to the County of Imperial for roadway and bridge rights-of-way across LBR Canal and drain rights-of-way.

(39) LBR Contract No. 14-06-303-2683, executed December 22, 1967, consisting of a license issued to the County of Imperial for use and maintenance of road crossings on certain structures across the All-American Canal.

(40) LBR Contract No. 14-06-303-2788, executed February 26, 1970, granting to the State of California the right to construct, reconstruct, operate and maintain highway bridges and a highway across the right-of-way reserved for the All-American Canal.

(41) LBR Contract No. 14-06-300-149, consisting of an easement granted to the Imperial Irrigation District on February 19, 1934, (BLM Serial No. R 01908) for the Pilot Knob Power Plant.

(42) BLM Serial No. LA048474, right-of-way to the Imperial Irrigation District, approved December 8, 1930, for poles and transmission line.

(43) 60-foot wide easement along the International boundary reserved by Presidential Proclamation of May 27, 1907, for purposes of patrol and inspection by the United States Immigration and Naturalization Service.

(44) Two powerline extensions into Section 29, T.16S., R.22E. SRM authorized by the March 13, 1967, and April 1, 1966 letters from the Lower Colorado River Land Use Office to cover electric distribution lines to pumps on BLM agricultural permits 1C-1(A) and 1C-3(A).

c. There is hereby excepted from the provisions and effect of Section 2 hereof all rights and interests in lands in the so-called Bard area, including non-contiguous parcels, opened to private settlement pursuant to Section 25 of the Act of April 21, 1904 (33 Stat. 189, 224), including all lands in the Bard area heretofore patented prior to December 20, 1978 pursuant to the Reclamation Law of 1902 and acts amendatory and supplementary thereto and the Act of March 31, 1950, 64 Stat. 39.

As to all rights-of-way listed above which are not on lands listed in Paragraph d of this Section as fee lands of the United States not held in trust for the Quechan Tribe and which were issued under the assumption that the lands involved were not Indian lands, I hereby grant a right-of-way pursuant to the authority vested in me by the Acts of February 5, 1948, 62 Stat. 17, 25 U.S.C. 323-28, each such grant being for the unexpired term of the original grant and subject to precisely the same terms and conditions as contained in the original grant. The Tribe has given its consent to these grants in Resolution R-19-77 dated September 29, 1977, and Resolution R-1-81 dated January 13, 1981, and pursuant to 25 CFR 1.2, I hereby waive the requirements of 25 CFR part 161 pertaining to these rights-of-way, since I find that such waiver is in the best interest of the Quechan Tribe.

As to all other permits, leases and other non-fee rights and interests listed above which are not on lands listed in Paragraph d of this Section as fee lands of the United States not held in trust for the Quechan Tribe, and which were issued under the assumption that the lands involved were not Indian lands, the Tribe has authorized and consented to issuance of such permits, leases and other non-fee rights and interests in Tribal Resolution R-19-77 dated September 29, 1977, and Tribal resolution R-1-81 dated January 13, 1981, and I hereby approve the same, pursuant to authority contained in the Act of May 11, 1938, c. 198, Section 1, 52 Stat. 347, 25 U.S.C. 396a, the Act of August 15, 1894, c. 290, Section 1, 28 Stat. 305, 25 U.S.C. § 402, the Act of July 3, 1926, c. 787, 44 Stat. 894, 25 U.S.C. 402a, and the Act of August 9, 1955, c. 615, Section 1, 69 Stat. 539, 25 U.S.C. 415, and each such permit, lease or other right or interest being for the unexpired term and subject to precisely the same terms and conditions specified in the original instrument. Pursuant to 25 CFR 1.2, I hereby waive the requirements of 25 CFR Parts 131, 151 and 171 pertaining to these permits, leases and other rights and interests since I find that such

waiver is in the best interest of the Quechan Tribe.

d. There is hereby excepted from the provisions and effect of Section 2 hereof, fee title in the United States without being held in trust for the Quechan Tribe to the works and appurtenances, including but not limited to the works described in the following subparagraphs 1 through 18, constructed pursuant to Congressional authorization, including the Reclamation Act of June 17, 1902 (32 Stat. 388), acts amendatory and supplementary thereto, and the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057), and fee title in the United States, without being held in trust for the Quechan Tribe, to lands occupied by all of said works and appurtenances, and there is also reserved the right of the United States, its licensees and contractors, to operate, maintain, and reconstruct said works and appurtenances, including but not limited to:

(1) *The All-American Canal*, and all appurtenances (including, but not limited to, the Pilot Knob Checkdam and Wasteway back to the Colorado River) as generally shown on Drawing No. 35–300–48 dated February 1966, and Drawing No. 35303–2127 dated June 5, 1967, on file at the Bureau of Indian Affairs, Phoenix Area Realty Property Management Branch and incorporated herein by reference.

(2) *Laguna Dam Protection and Security Zone*, as shown on Drawing No. 423–300–704 dated June 6, 1972, on file at the Bureau of Indian Affairs, Phoenix Area Real Property Management Branch and incorporated herein by reference.

(3) *Laguna Settling Basin, Sediment Disposal Area and Security Zone*, as shown and named as "Channel" and most of the "Wildlife Area" on the above Drawing No. 423–300–704.

(4) *Yuma Main Canal, California Wasteway, and Colorado River Siphon.* The general location of the Yuma Main Canal and California Wasteway as shown and named on the above Drawing No. 35–300–48. The Siphon under the Colorado River is identified as "Siphon" on Drawing No. 212–303–1100, dated March 14, 1944, on file at the Bureau of Indian Affairs, Phoenix Area Real Property Management Branch and incorporated herein by reference.

(5) *Detention Reservoir Opposite Wash Overpasses on All-American Canal.* At present, there is only one area defined as a "Detention Reservoir," that being the Detention Reservoir as shown on the above Drawing No. 35–303–2127, basically existing below the All-American Canal. This reservoir is erroneously depicted as being part of the patented Bard area on the map referred to in Section 1 hereof.

(6) *Upper and Lower Reservation and Levees.* The locations of the Upper and Lower Protective Levees shown on Drawing No. 35–300–48; however, the Upper Levee is denoted only as "Reservation Levee." Both levees are properly denoted on the above Drawing No. 35–303–2127.

(7) *Old Yuma Main Canal.* The general location of this facility, a large portion of which is utilized as an interceptor drain, is shown on the above Drawing No. 212–303–1100.

(8) *Irrigation Canals and Laterals in Reservation Division Yuma Project.* Drawings Nos. 35–3–303–127 and 35–300–48 above show these irrigation facilities.

(9) *All Drainage Channels as Presently Exist.* Drawings Nos. 35–303–2127 and 35–300–48 above, indicate these facilities.

(10) *Siphon Drop and Pilot Knob Power Plants together with existing Related Transmission Lines and Appurtenances.* Both the Siphon Drop and Pilot Knob Power Plant locations as shown on the above Drawing No. 35–300–48, respectively named "Siphon Drop Power Plant" and "Pilot Knob Plant." In both cases, related facilities and appurtenances such as the Pilot Knob Drop, residences, other buildings, and related transmission lines and communication lines are not identified on any drawing.

(11) *Well Clusters.* Several well clusters are placed along the Colorado River Flood Plain in conjunction with the U.S. Geological Survey, the purpose of which is a study to measure return flows. There is no reproducible drawing that would show as a composite the

locations. The general locations are shown by "blue" lines on the above Drawing No. 35–300–48.

(12) *Parker-Davis 161-Kv Transmission Line.* This line traverses the area from its crossing of the Colorado River westerly to the Pilot Knob Substation. The location is shown on the above Drawing No. 35–300–48.

(13) *Boundary Pumping Plant 34.5-Kv Transmission Line.* This line interties the Valley Division's boundary pumping plant, the Yuma County Water Users' Association Headquarters Building, California Wasteway, Siphon Drop, and Imperial Dam, and is shown on the above Drawing No. 35–300–48.

(14) *Interconnecting Telephone Electrical, and Remote Control Lines to Project Features.* These features, which are appurtenances to other project facilities, are not contained on any drawings but are largely within rights-of-way of other project features.

(15) *Senator Wash Dam 69-Kv Transmission Line.* Location shown on the above Drawing No. 35–300–38.

(16) *Collector Line (South Gila Drainage).* Location shown on Drawing No. 35–300–48 by "blue" pencil line extending from the Colorado River to South Gila Levee.

(17) *South Gila Levee (including Main Outlet Drain Extension).* Location shown by Drawing No. 35–300–48 as revised in ink to show now existing conditions resulting from installation of a siphon to replace the earlier flume.

(18) *Gauging Station.* Location shown by "blue" pencil mark below the letters "ol" in the word "seminole" on Drawing No. 35–300–48, below the Winterhaven townsite, including access road to cable gauging station in Section 27, T.16S, R 22 E. SBM California.

Provided, however, that should any of the above works and rights-of-way (excepting the works described in subparagraphs (1), (4), and (10) hereto), be abandoned or cease to be used in connection with authorized Reclamation projects by the United States as determined in writing by the Secretary of the Interior equitable title thereto shall revert to the Tribe, in all instances where the Tribe owns equitable title to all lands immediately adjoining said works. A survey of the locations and extent of the areas occupied by the works and rights-of-way referred to above and the material sites referred to in paragraph 7 below will be made as promptly as possible by the United States without cost to the Tribe, and the results of that survey shall be reported to the Tribe, with any dispute referred to the Secretary for resolution.

e. There is hereby reserved to the United States, its officers, agents, employees, contractors, patentees, licensees, and holders of other rights, the right of ingress to, passage over and egress from such lands over existing or relocated roadways at all times for the purpose of exercising the rights specified in this Order and for all lawful purposes in connection with the maintenance and operation of all Reclamation works: *Provided, however,* That new roadways will not be constructed on reservation lands without consent of the Tribe, and that existing roadways may be relocated by the Tribe at its own expense so long as their adequacy for the purpose served by the original roadway is approved by the agency or organization using the roadway to the relocation of the roadway.

f. The Tribe's equitable title to such lands within the flood plain of the Colorado River, including Laguna Dam South Recreational Area, shall be subject to the rights of the United States under the Act of June 28, 1946, 60 Stat 338. The Tribe shall not construct or install or permit the construction or installation of any permanent improvements of such lands within the flood plain or floodway, as shown by "red" coloring on Drawing No. 423–300–1036 (Bureau of Reclamation, Flood Plain Information—Colorado River-Imperial Dam to San Luis, Plate 3 (August 1973)), on file at the Bureau of Indian Affairs, Phoenix Area Branch of Real Property Management and incorporated herein by reference, nor will the Tribe permit said lands to be used in any manner inconsistent, with or contrary to, the purpose or intent of Executive Order No. 11988.

g. There is hereby reserved to the United States the right to continue in

exclusive possession of all presently used material sites located within the now recognized reservation boundaries, of sand, gravel, fill, clay and rock to the extent reasonably necessary for operation and maintenance of its project works; *Provided, however,* That the sites are abandoned or the use thereof is changed in any substantial manner by the United States, possession shall revert to the Tribe at its option. *Provided, further,* That the United States shall pay to the Tribe fair market value of any and all materials removed from these sites from and after the date of this Order, and shall make regular periodic reports to the Tribe concerning the value of all materials removed.

Sec. 4. Miscellaneous Provisions

a. Nothing contained herein shall prevent the Tribe from recovering whatever compensation it may be determined is appropriate in any proceeding now pending or hereafter brought against the United States for past use of such lands.

b. The Quechan Tribe has agreed, pursuant to Tribal Resolution #R-1-81 dated January 13, 1981, to relinquish any claim for damages it might have for trespass against third parties who acquired rights-of-way across such lands from the United States under the assumption that such lands were not Indian lands.

c. Any claim for water rights in addition to that amount presently enjoyed under *Arizona* v. *California*, asserted in relation to such lands, will be predicated only upon the criteria heretofore employed in *Arizona* v. *California*.

e. The Order determines the respective interests to such lands of the United States and the Quechan Tribe, subject to the provisions of Section 3 of this Order. This Order does not affect any claim of the State of Arizona or the State of California or any successor of interest thereof may have to such lands.

d. All agencies of the Department are hereby directed promptly to take all necessary steps to implement the Opinion of the Solicitor and the terms of this Notice of Secretarial Determination and Directives.

Dated: January 30, 1981.

James G. Watt,

Secretary of the Interior.

[FR Doc. 81-4439 Filed 2-5-81; 8:45 am]

BILLING CODE 4310-02-M

TABLE I

ALMONDS

Yield = 2000 lbs/acre (in shell)
Price = 76¢ lb. (in shell)
(1977-1979 Average)
Pre-Harvest and Harvest Costs reduced to 1979 level
Interest = 10%

Year	1	2	3	4	5	6	7	8	9	10
Yield - lbs. per acres	-	-	-	800	1310	1600	1850	2000	2000	2000
Gross Income at 76¢/lb.	-	-	-	608	996	1216	1406	1520	1520	1520
Pre-Harvest Cost	745	173	261	374	392	392	392	392	392	392
Depreciation	76	76	76	76	76	76	76	76	76	76
Interest on Investment at 10%										
Irrigation System	57	57	57	57	57	57	57	57	57	57
Building, Equipment & Tractor	10	10	10	10	10	10	10	10	10	10
Interest on Accumulated Net Cost	-	124	202	298	361	399	420	425	420	414
Total Interest	67	191	269	365	428	466	487	492	487	481
Harvest Cost	-	-	-	79	130	151	157	160	160	160
Payment Capacity	347	347	347	347	347	347	347	347	347	347
Total Annual Cost	1235	787	953	1241	1373	1432	1459	1467	1462	1456
Net Annual Cost or (Profit)	1235	787	953	633	377	216	53	(53)	(58)	(64)
Accumulated Net Cost or (Profit)	1235	2022	2975	3608	3985	4201	4254	4201	4143	4079

11	12	13	14	15	16	17	18	19	20
2000	2000	2000	2000	2000	2000	2000	2000	2000	2000
1520	1520	1520	1520	1520	1520	1520	1520	1520	1520
392	392	392	392	392	392	392	392	392	392
76	76	76	76	76	76	76	76	76	76
57	57	57	57	57	57	57	57	57	57
10	10	10	10	10	10	10	10	10	10
408	401	393	385	375	365	354	341	328	313
475	468	460	452	442	432	421	408	395	380
160	160	160	160	160	160	160	160	160	160
347	347	347	347	347	347	347	347	347	347
1450	1443	1435	1427	1417	1407	1396	1383	1370	1355
(70)	(77)	(85)	(93)	(103)	(113)	(124)	(137)	(150)	(165)
4009	3932	3847	3754	3651	3538	3414	3277	3127	2962

21	22	23	24	25	26	27	28	29	30
2000	2000	2000	2000	2000	2000	2000	2000	2000	2000
1520	1520	1520	1520	1520	1520	1520	1520	1520	1520
392	392	392	392	392	392	392	392	392	392
76	76	76	76	76	76	76	76	76	76
57	57	57	57	57	57	57	57	57	57
10	10	10	10	10	10	10	10	10	10
296	278	258	236	212	185	156	124	88	49
363	345	325	303	279	252	223	191	155	116
160	160	160	160	160	160	160	160	160	160
347	347	347	347	347	347	347	347	347	347
1338	1320	1300	1278	1254	1227	1198	1166	1130	1091
(182)	(200)	(220)	(242)	(266)	(293)	(322)	(354)	(390)	(429)
2780	2580	2360	2118	1852	1559	1237	883	493	64

TABLE 2

A' 'ONDS

Different method of computation.
Reaches same payment capacity as
in Table 1

Year	1	2	3	4	5	6	7	8	9	10
Yield - lbs, per acre	-	-	-	800	1310	1600	1850	2000	2000	2000
Gross Income at 76¢/lb.	-	-	-	608	996	1216	1406	1520	1520	1520
Pre-Harvest Cost	745	173	261	374	392	392	392	392	392	392
Depreciation	76	76	76	76	76	76	76	76	76	76
Increase on investment at 10%										
Irrigation System	57	57	57	57	57	57	57	57	57	57
Building, Equipment & Tractor	10	10	10	10	10	10	10	10	10	10
Interest on Accumulated Net Cost	-	89	129	183	200	187	152	96	23	-
Total Interest	67	156	196	250	267	254	219	163	90	67
Harvest Cost	-	-	-	79	130	151	157	160	160	160
Total Annual Cost	888	405	533	779	865	873	844	791	718	695
Net Annual Cost or (Profit)	888	405	533	171	(131)	(343)	(562)	(729)	(802)	(825)
Accumulated Net Cost or (Profit)	888	1293	1826	1997	1866	1523	961	232	(570)	(1395)

		30
	. . .	2000
	. . .	1520
	. . .	392
	. . .	76
	. . .	57
	. . .	10
	. . .	-
		67
	. . .	160
	. . .	695
	. . .	(825)
	. . .	(17895)

Net Cash Flows:

Year 9 = $570

Years 10-30 = $825/yr

Present Value of $825 received in years 10-30 is:

$825 x 8.6487 x .4241 = $3026

Present Value of $570 received in year 9 is:

$570 x .4241 = $241.74

Present Value of All Cash Flows is:

$3026 + $242 = $3268

Annualized Amount over 30 years $\frac{\$3268}{9.4269} = \$\ 347$

Annual Payment Capacity $\$\ 347$

TABLE 3

FIGS

Yield = 1.94 tons/acre
Price = $730 (1975-79)
Pre-Harvest and Harvest Costs Reduced to 1979 Level and
Harvest Costs Prorated Based on Yield
Interest = 10%

Year	1	2	3	4	5	6	7	8	9	10
Yield - tons per acre (dry)	-	-	-	.2	.5	.8	1.3	1.7	1.94	1.94
Gross Income - $730 per ton (dry)	-	-	-	146	365	584	949	1241	1416	1416
Pre-Harvest Cost	970	185	236	303	332	332	332	332	332	332
Depreciation	93	93	93	93	93	93	93	93	93	93
Interest on Investment at 10%										
Irrigation System	57	57	57	57	57	57	57	57	57	57
Building, Equipment & Tractor	18	18	18	18	18	18	18	18	18	18
Interest on Accumulated Net Cost	-	114	161	217	275	324	361	375	367	346
Total Interest	75	189	236	292	350	399	436	450	442	421
Harvest Cost	-	-	-	34	80	137	229	286	332	332
Total Annual Cost	1138	467	565	722	855	961	1090	1161	1199	1178
Net Annual Cost or (Profit)	1138	467	565	576	490	377	141	(80)	(217)	(238)
Accumulated Net Cost or (Profit)	1138	1605	2170	2746	3236	3613	3754	3674	3457	3219

11	12	13	14	15	16	17	18	19	20	. . .	30
1.94	1.94	1.94	1.94	1.94	1.94	1.94	1.94	1.94	1.94	. . .	1.94
1416	1416	1416	1416	1416	1416	1416	1416	1416	1416	. . .	1416
332	332	332	332	332	332	332	332	332	332	. . .	332
93	93	93	93	93	93	93	93	93	93	. . .	93
57	57	57	57	57	57	57	57	57	57	. . .	57
18	18	18	18	18	18	18	18	18	18	. . .	18
322	296	267	235	200	162	120	73	22	-	. . .	-
397	370	342	310	275	237	195	148	97	75	. . .	75
332	332	332	332	332	332	332	332	332	332	. . .	332
1154	1127	1099	1067	1032	994	952	905	854	832	. . .	832
(262)	(289)	(317)	(349)	(384)	(422)	(464)	(511)	(562)	(584)	. . .	(584)
2957	2668	2351	2002	1618	1196	732	221	(341)	(925)	. . .	(6765)

Cash Flows:

$341 in year 19
$584 in each of years 20-30

Present Value of $341 received in year 19 is:

$341 x .1635 = $56

Present Value of $584 received in years 20-30 is:

$584 x 6.4951 x .1635 = $620

Present value of both cash flows is:

$676 = $620 + $56

Annualized Amount over 30 years:

$$\frac{\$676}{9.4269} = \$71.7$$

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IN THE

Supreme Court of the United States

October Term, 1981

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

EXCEPTIONS OF THE STATES OF ARIZONA, CALIFORNIA, AND NEVADA AND THE OTHER CALIFORNIA DEFENDANTS TO THE REPORT OF SPECIAL MASTER ELBERT P. TUTTLE; AND BRIEF OF SAID PARTIES IN SUPPORT OF EXCEPTIONS.

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TABLE OF CONTENTS

Page

Exceptions of the States of Arizona, California, and Nevada and the Other California Defendants to the Report of Special Master Elbert P. Tuttle 1

Statement of Exceptions 2

I.

Exceptions Relating to the Special Master's Determination to Hear Claims and Award Water Rights for So-called "Omitted Lands" Which Were Recognized as Part of the Indian Reservations in the Prior Proceeding but for Which No Water Rights Were Asserted. (Spec. Master's Rep., pp. 29-55.) 2

A. The Issue 2

B. The Determination to Which Exception Is Taken 2

C. The Correct Conclusions 3

II.

Exceptions Relating to the Special Master's Conclusion That Certain Disputed Boundaries of the Indian Reservations Were "Finally Determined" Within the Meaning of Article II(D)(5) of the 1964 Decree and His Consideration of Lands So Added for Adjustment of the Decreed Water Allocations of Those Reservations. (Spec. Master's Rep., pp. 55-76.) 3

A. The Issue 3

B. The Determinations to Which Exception Is Taken 3

C. The Correct Conclusions 4

III. Page

Exceptions Relating to the Special Master's Determinations of the Amount of "Practicably Irrigable Acreage" Within the Areas Claimed for Additional Water Rights by the United States and the Indian Tribes. (Spec. Master's Rep., pp. 112-277.) 4

A. The Issue 4

B. The Determination to Which Exception Is Taken 5

C. The Correct Conclusions 5

IV.

Exceptions Relating to the Special Master's Determination to Allow Unconditional Intervention by the Five Indian Tribes in This Suit. (Spec. Master's Rep., pp. 26-27.) 6

A. The Issue 6

B. The Determination to Which Exception Is Taken 7

C. The Correct Conclusions 7

Brief in Support of Exceptions 11

Introduction 11

Argument 15

I.

The Special Master Erred in Permitting the United States and the Tribes to Relitigate the Issue of the Magnitude of "Practicably Irrigable Acreage" Within the Five Indian Reservations Boundaries as Recognized in the Prior Proceeding 15

A. Introduction 15

B. The Prior Litigation 17

C. The Present Proceedings 21

Page

D. Article IX of the 1964 Decree Does Not Provide a Valid Basis for Consideration of the Claims for Lands Previously Determined to Be Not Practicably Irrigable 23

1. In the Prior Proceeding the Former Master Rejected the United States' Recommendations for Unrestricted Modification Authority 24

2. The Special Master Has Misinterpreted Article IX as Creating an Open-ended Decree 26

E. The Principles of Res Judicata Preclude Consideration of the Omitted Lands Claims 32

F. Even if Res Judicata Is Inapplicable, the Doctrine of Law of the Case Should Bar Relitigation of the Omitted Lands Claims 38

G. The Prior Findings on Practicably Irrigable Acreage Should Not Be Reopened Because the State Parties Have Relied on the 1964 Water Allocations and the Tribes Have Another Avenue of Relief if the United States' Prior Representation Was Legally Inadequate 45

1. Reliance by the State Parties on the 1964 Water Allocations 47

2. Alternative Relief for the Tribes: the Court of Claims 53

II.

The Special Master, in Accepting as Conclusive the Disputed Reservation Boundaries Established by the United States and Proceeding to Try the Issue of Practicably Irrigable Acreage Within Added

Page

Lands for Purposes of Increasing the Water Allocations of the Reservations, Has Acted Contrary to the Court's 1964 Decree Allowing Adjustment of Water Allocations Only When the Disputed Boundaries Have Been Finally Determined 56

A. Introduction 56

B. Significance of the Disputed Reservation Boundaries Issue 57

C. Interpretation of the Court's Intent in Providing for Adjustment of Reservation Water Allocations Under Article II(D)(5) 59

1. Orders of the Secretary of the Interior .. 60

2. Federal Court Cases Involving Reservation Boundaries 64

D. Reasoning of the Special Master in Support of His Ruling 66

E. Conclusion 77

III.

The Special Master Erred in His Determination of the Amount of Practicably Irrigable Acreage Within the Omitted and Boundary Lands, With the Results That He Awarded the Indian Tribes Water Rights Far in Excess of What the Evidence Supports 78

A. Introduction 78

1. Shifting the Burden of Proof — Double Standard 79

2. Conceptual Errors 85

B. United States Claims 88

1. Sandy and Gravelly/Cobbly Lands: Yields and Production Costs 88

2. Water Cost Lands: Power Rates 92

TABLE 4

FIGS WITH 1/4 YIELD EXPOSED TO RAIN
(at 7¢ per lb.)

Year	1	2	3	4	5	6	7	8	9	10
Yield - tons per acre (dry)	-	-	-	.2	.5	.8	1.3	1.7	1.94	1.94
Gross Income - $730 per ton (dry)	-	-	-	146	365	584	949	1241	1416	1416
Rain Expenses	-	-	-	7	17	28	45	59	68	68
Revenue	-	-	-	139	348	556	904	1182	1348	1348
Pre-Harvest Cost	970	185	236	303	332	332	332	332	332	332
Depreciation	93	93	93	93	93	93	93	93	93	93
Interest on Investment at 10%										
Irrigation System	57	57	57	57	57	57	57	57	57	57
Building, Equipment & Tractor	18	18	18	18	18	18	18	18	18	18
Interest on Accumulated Net Cost	-	114	161	217	275	326	367	386	385	372
Total Interest	75	189	236	292	350	401	442	461	460	447
Harvest Cost	-	-	-	34	80	137	229	286	332	332
Total Annual Cost	1138	467	565	722	855	963	1096	1172	1217	1204
Net Annual Cost or (Profit)	1138	467	565	583	507	407	192	(10)	(131)	(144)
Accumulated Net Cost or (Profit)	1138	1605	2170	2753	3260	3667	3859	3849	3718	3574

11	12	13	14	15	16	17	18	19	20
1.94	1.94	1.94	1.94	1.94	1.94	1.94	1.94	1.94	1.94
1416	1416	1416	1416	1416	1416	1416	1416	1416	1416
68	68	68	68	68	68	68	68	68	68
1348	1348	1348	1348	1348	1348	1348	1348	1348	1348
332	332	332	332	332	332	332	332	332	332
93	93	93	93	93	93	93	93	93	93
57	57	57	57	57	57	57	57	57	57
18	18	18	18	18	18	18	18	18	18
357	342	324	305	284	260	235	207	176	142
432	417	399	380	359	335	310	282	251	217
332	332	332	332	332	332	332	332	332	332
1189	1174	1156	1137	1116	1092	1067	1039	1008	974
(159)	(174)	(192)	(211)	(232)	(256)	(281)	(309)	(340)	(374)
3415	3241	3049	2838	2606	2350	2069	1760	1420	1046

21	22	23	24	...	30
1.94	1.94	1.94	1.94	...	1.94
1416	1416	1416	1416	...	1416
68	68	68	68	...	68
1348	1348	1348	1348	...	1348
332	332	332	332	...	332
93	93	93	93	...	93
57	57	57	57	...	57
18	18	18	18	...	18
105	64	18	-	...	-
180	139	93	75	...	75
332	332	332	332	...	332
937	896	850	832	...	832
(411)	(452)	(498)	(516)	...	(516)
635	183	(315)	(831)	...	(3927)

Cash Flows:

$315 in year 23
$516 in each of years 24-30

Present Value of $319 received in year 23 is:

$315 x 0.1117 = $35

Present Value of $516 received in years 25-30 is:

$516 x 4.8684 x 0.1117 = $281

Present Value of All Cash Flows:

$35 + 281 = $316

Annualized Amount over 30 years:

$$\frac{\$316}{9.4269} = \$34$$

Page

C. Indian Tribes Claims 94
1. Introduction 94
2. Crop Prices 98
(a) Almonds 99
(b) Grapes 107
D. Conclusion 116

IV.

The Special Master Erred in Granting Unconditional Intervention to the Indian Tribes 118
A. Introduction 118
B. Applicability of the Eleventh Amendment 119
1. Intervention by the Five Tribes Constitutes Suit Against the Three States 119
2. Ancillary Jurisdiction Does Not Provide a Jurisdictional Basis Overcoming the Sovereign Immunity of the State 121
3. State Immunity Is Not Abrogated by 28 U.S.C. § 1362 122
C. Rule 24 Does Not Permit Intervention by the Tribes in the Present Proceeding 125
1. Rule 24 Cannot Circumvent the Jurisdictional Bar Created in Granting the Tribes Leave to Intervene by the Doctrine of Sovereign Immunity 125
2. Intervention by the Navajo Tribe Was Previously Denied 126
Conclusion 127

INDEX TO APPENDICES

Page

Appendix A. Pertinent Statements Involved from Transcript ..... App. p. 1

Appendix B. Letter to Mr. Robert P. Will, General Counsel, The Metropolitan Water District of Southern California, Dated January 3, 1979 15

Appendix C. Letter to Counsel for State Parties and Tribes, re Copies of Some of the Computations, Dated December 18, 1981 17

Appendix D. Computation for Table Grapes Using Yield of 450 Lugs Per Acre 23

TABLE OF AUTHORITIES

Cases	Page
Addington v. Texas, 441 U.S. 418 (1979)	82
Aguilar v. Kleppe, 424 F.Supp. 433 (D.C. Alaska 1976)	124
Aldinger v. Howard, 427 U.S. 1 (1976)	121
Arizona v. California, 373 U.S. 546 (1963) 17, 19, 21, 24, 48, 56, 58, 59, 67,	68
Arizona v. California, 376 U.S. 340 (1964) 57, 59,	120
Arizona v. California, 439 U.S. 421 (1979) 49, 60,	63
Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10 (1935)	71
Bruszewski v. United States, 181 F.2d 419 (3rd Cir. 1950), cert. denied, 340 U.S. 865 (1950)	65
Cheyenne River Sioux Indians v. United States, 338 F.2d 906 (8th Cir. 1964), cert. denied, 382 U.S. 815 (1965)	35
Cocopah Tribe of Indians v. Morton, 70-573-PHX-WEC (1975)	66
Confederated Tribes of the Colville Indian Reservation v. State of Washington, 446 F.Supp. 1339 (E.D.C. Wash. 1978), aff'd in part and rev'd in part on other grounds, 447 U.S. 834 (1980), reh. denied, 448 U.S. 911 (1980) 120,	124
Craglin v. Powell, 128 U.S. 691 (1888)	71
Edelman v. Jordan, 415 U.S. 651 (1974) 122,	124
Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973)	122
Environmental Defense Fund v. Higginson, 631 F.2d 738	127
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)	122

Page

Ford Motor Co. v. Treasury Department, 232 U.S. 459 (1945) 120

Fort Mojave Tribe v. LaFollette, 478 F.2d 1016 (9th Cir. 1973) 123

Heckman v. United States, 224 U.S. 413 (1912) 18, 33, 55, 121, 127

Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979), cert. denied, 444 U.S. 995 34

Knight v. United States Land Association, 142 U.S. 161 (1891) 71

Laffey v. Northwest Airlines, Inc., 642 F.2d 578 (D.C. Cir. 1980) 38, 39

Maryland & Casualty Co. v. Pacific Coal and Oil Co., 312 U.S. 270 (1941) 75

Mitchell v. United States, 445 U.S. 535, reh. denied, 446 U.S. 992 (1980) 54

Mitchell v. United States, 664 F.2d 265 (Ct. Cl. 1981) 55

Moe v. Confederated Salish and Kootenai Tribes, etc., 425 U.S. 463 (1976) 122, 123, 124

Montana v. United States, 440 U.S. 147 (1979) 37

Nebraska v. Wyoming, 325 U.S. 589 (1945) 30, 31, 41

New Jersey v. New York, 283 U.S. 336 (1931) 29

New Jersey v. New York, 345 U.S. 369 (1953) 127

Oklahoma v. Texas, 256 U.S. 70 (1921) 37

Oklahoma v. Texas, 258 U.S. 574 (1922) 121

Oneida Indian Nation v. State of New York, 520 F.Supp. 1278 (1981) 125

Otten v. Stonewall Insurance Company, 538 F.2d 210 (8th Cir. 1976) 40

Page

Owen Equipment and Erection Company v. Kroger, 437 U.S. 365 (1978) 121

Parden v. Terminal Railroad Co., 377 U.S. 184 (1964) 122

Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968) 18, 55, 123

Quern v. Jordan, 440 U.S. 332 (1979) 122, 124

Rhode Island v. Massachusetts, 37 U.S. 657 67

Russell v. Maxwell Land Grant Co., 158 U.S. 253 (1895) 71

Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135 (8th Cir. 1974) 123

State of New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), cert. denied, 429 U.S. 1121 (1977) 34, 35

Stoneroad v. Stoneroad, 158 U.S. 240 (1895) 71

Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16 (5th Cir.), cert. denied, 419 U.S. 987 (1974) .. 40

United States v. Brigham Young University, 73-358-DWW (U.S. D.C. 1976) 66

United States v. Curtis, 72-1624-DWW (U.S. D.C. 1977) 66

United States v. Denham, 73-495-ALS (U.S. D.C. 1975) 66

United States v. Emmons, 351 F.2d 603 (9th Cir. 1965) 33

United States v. New Mexico, 438 U.S. 696 (1978) 16, 39

United States v. Powers, 305 U.S. 527 (1939) 44

United States v. State of Louisiana, 229 F.Supp. 14 (Lafayette Division 1964) 64

Page

United States v. Truckee-Carson Irrigation District, 649 F.2d 1286 (9th Cir. 1981) 34, 35

United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939) 44

Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979) ... 39

White v. Murtha, 377 F.2d 428 (5th Cir. 1967) 38, 40

Winters v. United States, 207 U.S. 564 (1908) .. 11, 12 ..... 16, 17, 18, 20, 26, 27 ..... 40, 44, 46, 56, 57, 73, 77

Wisconsin v. Illinois, 281 U.S. 179 (1930) 29

Wyoming v. Colorado, 259 U.S. 419 (1922) 41

Constitution

United States Constitution, Eleventh Amendment 7, 8, 16, 118, 119, 122

Miscellaneous

H.R. Rep. No. 2040, 89th Congr., reprinted in [1966] U.S. Code Cong. & Ad. News, p. 3145 124

Rules

Federal Rules of Civil Procedure, Rule 24 .... 6, 7, 8, 125, 126

Federal Rules of Civil Procedure, Rule 24(a) .. 118, 126

Federal Rules of Civil Procedure, Rule 82 126

Federal Rules of Evidence, Rule 201 ..... 62, 73

Rules of the Supreme Court of the United States, Rule 9 126

Statutes

Page

Boulder Canyon Project Act, Sec. 5 31

24 Statutes at Large, p. 388 as amended (25 U.S.C. §§ 331 et seq.) 54

United States Code, Title 25, Sec. 175 (1976) .. 18, 55

United States Code, Title 28, Sec. 1362 .... 7, 118, 122, 123, 124, 125

United States Code, Title 28, Sec. 1381 124

United States Code, Title 28, Sec. 1505 ..... 54, 55

United States Code Annotated, Title 28, Sec. 1345 75

United States Code Annotated, Title 28, Sec. 2201 75

Treatises

Hart and Wechsler, The Federal Courts and the Federal System, p. 250 (2d ed. 1973) 127

1 Moore's Federal Practice, ¶0.62[18-3], 700-69, 700.70, Fn. 7 (1982) 122, 123

Wilbur and Ely, The Hoover Dam Documents (1948 ed.), A479, A507, A535 49

Wright, C. and A. Miller, 7A Federal Courts, Sec. 1917, p. 587 (1972 ed.) 126

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STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

EXCEPTIONS OF THE STATES OF ARIZONA, CALIFORNIA, AND NEVADA AND THE OTHER CALIFORNIA DEFENDANTS TO THE REPORT OF SPECIAL MASTER ELBERT P. TUTTLE.

The States of Arizona, California, and Nevada and the other California Defendants (hereinafter referred to as "State Parties") hereby file these Exceptions to the Report of Special Master Elbert P. Tuttle, dated February 22, 1982, pursuant to the order of the Court, dated April 5, 1982.

These exceptions are based on the grounds, to be developed in our supporting brief, that the determinations of the Special Master are erroneous and are contrary to the evidence and the law.

STATEMENT OF EXCEPTIONS.

The States of Arizona, California, and Nevada and the other California Defendants except to the Report of Special Master Elbert P. Tuttle, dated February 22, 1982, upon the following grounds:

I.

EXCEPTIONS RELATING TO THE SPECIAL MASTER'S DETERMINATION TO HEAR CLAIMS AND AWARD WATER RIGHTS FOR SO-CALLED "OMITTED LANDS" WHICH WERE RECOGNIZED AS PART OF THE INDIAN RESERVATIONS IN THE PRIOR PROCEEDING BUT FOR WHICH NO WATER RIGHTS WERE ASSERTED. (Spec. Master's Rep., pp. 29-55.)

A. The Issue.

Whether Article IX of the Court's 1964 Decree in this case and the doctrines of *res judicata,* collateral estoppel, and law of the case permit the relitigation of practicably irrigable acreage within the recognized 1964 boundaries?

B. The Determination to Which Exception Is Taken.

The Special Master erroneously concludes:

Water rights may be allocated for any reservation lands which are practicably irrigable but which the United States or Indian Tribes* contend were omitted from the determination of practicably irrigable acreage within the 1964 boundaries.

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*The five Tribes are the Ft. Mojave, Chemehuevi, Colorado River, Cocopah, and Quechan Tribe of the Ft. Yuma Indian Reservation.

C. The Correct Conclusions.

The Special Master should have concluded:

1. The Court intended Article IX to reserve jurisdiction only over matters not finally determined and that it did, in Article II of the Decree, finally adjudicate irrigable acreage within the 1964 boundaries, as recommended by the previous Special Master. Such final adjudication is not subject to the Court's continuing jurisdiction under Article IX.

2. Relitigation of practicably irrigable acreage within the 1964 boundaries is precluded by the public policy considerations behind the doctrines of *res judicata* and collateral estoppel and by the doctrine of the law of the case.

II.

EXCEPTIONS RELATING TO THE SPECIAL MASTER'S CONCLUSION THAT CERTAIN DISPUTED BOUNDARIES OF THE INDIAN RESERVATIONS WERE "FINALLY DETERMINED" WITHIN THE MEANING OF ARTICLE II(D)(5) OF THE 1964 DECREE AND HIS CONSIDERATION OF LANDS SO ADDED FOR ADJUSTMENT OF THE DECREED WATER ALLOCATIONS OF THOSE RESERVATIONS. (Spec. Master's Rep., pp. 55-76.)

A. The Issue.

Whether the disputed boundaries of the respective Indian reservations have been "finally determined" within the meaning of Article II(D)(5) of the March 9, 1964 Decree, permitting adjustment by this Court of the reservation water allocations?

B. The Determinations to Which Exception Is Taken.

The Special Master erroneously concludes that:

The determinations that have been made through certain orders of the Secretary of the Interior and certain trial court

judgments with respect to the disputed boundary changes may be accepted as final for the purpose of considering additional allocations of water rights to the reservations.

C. The Correct Conclusions.

The Special Master should have concluded:

The orders of the Secretary of the Interior and the judgments in the federal court cases are not final determinations of reservation boundaries for purposes of establishing water rights. The Secretarial orders relied on by the Tribes are functional for Department of the Interior administrative purposes, but cannot be considered final for the purpose of establishing claims for federally reserved water rights. The federal court judgments do not have *res judicata* effect on the rights of the State Parties who were not parties to the actions nor in privity with any party. The United States and the Tribes must first establish through adjudication with the contesting State Parties in other litigation or in these proceedings the disputed boundaries upon which they rely for claims of additional water allocations.

III.

EXCEPTIONS RELATING TO THE SPECIAL MASTER'S DETERMINATIONS OF THE AMOUNT OF "PRACTICABLY IRRIGABLE ACREAGE" WITHIN THE AREAS CLAIMED FOR ADDITIONAL WATER RIGHTS BY THE UNITED STATES AND THE INDIAN TRIBES. (Spec. Master's Rep., pp. 112-277.)

A. The Issue.

Whether the lands for which water rights are claimed by the United States and by the Indian Tribes are "practicably irrigable" within the meaning of the 1964 Decree?

B. The Determination to Which Exception Is Taken.

The Special Master erroneously concludes that:

Of the land claimed as "practicably irrigable" by the United States and the Indian Tribes, there are the following amounts of net practicably irrigable acreage for which the following water rights should be decreed (Spec. Master's Rep., pp. 116, 121):

Reservation	Net Irrigable Acreage (U.S. and Tribe claims)	Diversion Amounts in Acre-Feet (U.S. and Tribe claims)
Ft. Mojave	5,616	36,280
Chemehuevi	1,621	9,677
Colorado River	27,745	185,059
Cocopah	1,170	7,453
Ft. Yuma	11,772	78,519

As a result of these errors, the Special Master's Recommended Decree (Spec. Master's Rep., pp. 281-83), which incorporates these figures, is also erroneous.

C. The Correct Conclusions.

The Special Master should have concluded that:

Of the land claimed as "practicably irrigable" by the United States and the Indian Tribes, there is *less* net practicably irrigable acreage for which *fewer* water rights should be decreed than is listed above. The amounts by which the Special Master has thus *overstated* net practicably irrigable acreage and water rights are listed below (see *infra*, Table 1.):

Reservation	Net Irrigable Acreage (U.S. and Tribe claims)	Diversion Amounts in Acre-Feet (U.S. and Tribe claims)
Ft. Mojave	2,054	13,269
Chemehuevi	919	5,486
Colorado River	7,245	48,324
Cocopah	8	51
Ft. Yuma	6,623	44,175

To correct this overstatement by the Special Master, the figures for acreage and diversions in the Recommended Decree (Spec. Master's Rep., pp. 281-83) must be accordingly decreased to the following levels:

Reservation	Acres	Diversion Amounts in Acre-Feet
Ft. Mojave	22,536	145,659
Chemehuevi	2,602	15,531
Colorado River	128,088	853,883
Cocopah	1,593	10,146
Ft. Yuma	12,892	85,960

IV.

EXCEPTIONS RELATING TO THE SPECIAL MASTER'S DETERMINATION TO ALLOW UNCONDITIONAL INTERVENTION BY THE FIVE INDIAN TRIBES IN THIS SUIT. (Spec. Master's Rep., pp. 26-27.)

A. The Issue.

Whether the Eleventh Amendment bars intervention in this suit by the Indian Tribes without the consent of the States of Arizona, California, and Nevada and whether Rule 24 of the Federal Rules of Civil Procedure permits intervention notwithstanding any such bar.

B. The Determinations to Which Exception Is Taken.

The Special Master erroneously concludes:

1. That the States' Eleventh Amendment immunity is not implicated by the Tribes' motions to intervene because their claims as intervenors are ancillary to a case or controversy between a state and sister states and between the United States and states.

2. Assuming the Eleventh Amendment immunity is implicated, 28 U.S.C. 1362 abrogated that immunity as regards suits by Indian tribes.

3. Pursuant to Rule 24, the Tribes should be permitted to unconditionally intervene because their direct pecuniary interests will be affected by this litigation and because there is a possibility that representation of the Tribes' interests by the United States may be inadequate.

C. The Correct Conclusions.

The Special Master should have concluded:

1. States of the Union are immune from suit by Indian tribes in federal court without their consent except where that immunity has been surrendered through the adoption of the Constitution of the United States as implemented by Congressional enactment. 28 U.S.C. 1362 does not constitute such a surrender, as applied to this case, because it only allows suits by Indian tribes in instances where the United States could have sued on their behalf but failed to do so.

2. By seeking to establish additional claims adverse to the three States, the intervention sought by the five Indian Tribes would constitute a suit against each State. The fact that the tribal claims have already been asserted before the Special Master by the United States does not deprive the

three States of their Eleventh Amendment right not to be sued by the Tribes also asserting those claims.

3. Rule 24 cannot be used to extend jurisdiction where, as here, it is barred by sovereign immunity.

WHEREFORE, the State Parties request that the Court rule on these Exceptions to the Report of Special Master Tuttle, that the Court decide this cause in the manner indicated above, and that the Court issue such further orders as it deems proper.

Respectfully submitted,

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No. 8, Original

IN THE

Supreme Court of the United States

October Term, 1981

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, *et al.*

BRIEF IN SUPPORT OF EXCEPTIONS.

Introduction.

When reviewing this case, one cannot help being reminded of the fundamental difficulty created in the *Winters* case. There the Court reasoned that Congress could not have intended to establish reservations as homelands for Indians without providing a water supply to make these otherwise arid lands habitable. Hence the *Winters* Doctrine, implied reservation of water rights, was born. We submit, a legally more sound conclusion, which would not have created the problems attendant with superimposing a new and superior water rights theory on existing water rights law, would have been the conclusion that Congress did merely establish the reservation with the setting aside of the land and that the responsible government agencies were expected to acquire the necessary water rights pursuant to existing law. Both appropriation, under relevant state law, and purchase or eminent domain were available means where the subject lands lacked adequate water rights.

This more reasonable conclusion was not practical in the *Winters* case for the United States had not acquired necessary rights by the time the water dispute arose and the Court was presented a situation that required the creation of a new doctrine if the purposes of the Indian reservation were to be achieved. In short, the burden of the United States in meeting its obligations to the Indians was to fall on those whose interests conflicted with the Indians rather than the nation as a whole.

We suggest that the difficulty in water rights law and policy created by the *Winters* case should not be compounded; that the sentiment shared by most for assisting the Indians should require the United States to meet its obligation rather than allow that obligation to be imposed on the few in the happenstance of particular litigation.

That this laudable sentiment is present herein is manifest. Contrary to well-established, sound judicial policy illustrated by numerous rules, the Special Master has permitted relitigation of the water rights of five reservations which rights were decided by this Court some 15 years earlier.

Equally shocking is the Special Master's decision to simply excuse the United States and the Tribes from proving that lands for which they claim a water right are in fact within the Indian reservations. The Special Master not only excuses this primary element of the claimants' cause of action, but prohibits adversary parties from proving otherwise. The actions taken by the Secretary of the Interior are not to be merely evidentiary, they are to be adjudicatory.

Similarly, the Special Master breaks new ground in granting petitions of the Indian Tribes to intervene to claim irrigable acreage and attendant water entitlements for all the acreage being claimed by the United States on their behalf, and a good deal more, so that each tribe has double rep-

resentation and the State Parties are confronted with two claims for four of the five reservations.

This sentiment of concern for the plight of the Indians goes even beyond these crucial rulings to the conduct and trial of the case itself. Thus, the Master rejected for trial, various issues advanced by the State Parties: whether the practicably irrigable acreage measure for water allocations is modified by the moderate standard of living rule; whether the practicably irrigable acreage measure may be applied to the Colorado River Indian Reservation, where that very large facility was established for several tribes who did not relocate there, but inhabit other reservations granted water rights; whether that water allocation measure is based upon irrigation technology existing at the time of trial, or at some earlier time. Indeed, the rather obvious issue of whether the State Parties relied to their detriment upon the 1964 Decree of this Court was rejected by the Special Master as an issue to be tried until the United States expressed its concurrence with the position of the State Parties. (Atlanta Tr., p. 228.)

And in the trial of evidentiary disputes, the burden of proof of the claimants was sometimes shifted to the State Parties — land would be regarded as practicably irrigable unless the State Parties convinced the Special Master otherwise; expert opinion of witnesses for the State Parties would be rejected as lacking a presentation of its evidentiary basis, but expert opinion of witnesses for the United States was not held to such a standard.

Thus, we submit the laudable sentiment with respect to Indians is badly misplaced in this judicial proceeding; that reopening of a fully tried water case after many years merely because a new generation of attorneys for the United States believes they can do better is to shift the alleged harm done the Indians to the State Parties; that treating Secretarial actions delineating from time to time reservation boundaries

as conclusive and binding upon the State Parties is to deprive them of their day in court to protect their water rights.

In our ensuing argument we will discuss move fully the errors of the Special Master's Report and the resulting injustice.

ARGUMENT.

I.

THE SPECIAL MASTER ERRED IN PERMITTING THE UNITED STATES AND THE TRIBES TO RELITIGATE THE ISSUE OF THE MAGNITUDE OF "PRACTICABLY IRRIGABLE ACREAGE" WITHIN THE FIVE INDIAN RESERVATIONS BOUNDARIES AS RECOGNIZED IN THE PRIOR PROCEEDING.

A. Introduction.

The motions of the United States and the five Indian Tribes for modification of the Court's 1964 Decree allocating water to the respective mainstream Indian reservations include claims for additional water entitlements for lands located within the uncontested boundaries of those reservations at the time of trial in the original proceedings but for which the United States made no claim that they were "practicably irrigable." These lands have been labeled by the United States and the Tribes as "omitted lands." A more accurate classification, as the State Parties show herein, is "rejected lands," since the record of the earlier proceedings clearly shows that the United States, at the time of trial in the 1950s, made a considered judgment that such lands were not "practicably irrigable" under the evidentiary standards selected by the United States in pressing its claims on behalf of the Tribes.

At the outset of the present hearings before the Special Master, the State Parties moved that the claims for the omitted lands should not be entertained because they were barred by the doctrines of *res judicata* and collateral estoppel or by the principles underlying them.

The Special Master deferred ruling on the State Parties' motion and took extensive evidence with respect to the omitted lands. In his report he concludes that the claims are not barred, relying on Article IX of the 1964 Decree. Con-

sequently, he proposes that the Court award the Tribes not only 135,681 acre-feet in diversion rights for 20,527 acres which the United States *now* claims are "practicably irrigable" and should have been claimed in the 1950s proceedings, but an additional 59,336 acre-feet of diversion rights for 8,909 acres which the Tribes, but not the United States, contend are "practicably irrigable." (Spec. Master's Rep., pp. 106-07, 109, 113-15, 118-20.) These increases of 15 and 22 percent, respectively, in the diversion rights and practicably irrigable acreage determined in the original proceedings are characterized by the Special Master as "relatively minor adjustments" to the rights established for the Indians in the 1964 Decree. (Spec. Master's Rep., p. 55.) The State Parties, who will suffer a "gallon for gallon" reduction in their available supply,[1] do not share the Special Master's view of the *de minimis* nature of the largesse which he has conferred on the Tribes.

The resulting serious impact on the non-Indian users, who have relied on the certainty with respect to the magnitude of the Tribes' *Winters* Doctrine[2] rights which the 1964 Decree was designed to achieve, was accomplished by two bold strokes of the Special Master. First, by a strained interpretation of the purpose of Article IX, he enables the current generation of Justice Department lawyers to second guess the legal interpretations, factual conclusions, evidentiary presentations, and trial strategies of their predecessors who had the difficult task of trying to quantify the scope of the Tribes' *Winters* rights in the 1950s. Second, by ignoring the States' Eleventh Amendment rights and the right and duty of the United States to exclusively represent Indian Tribes, he granted unrestricted intervention to the Tribes

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[1]*United States v. New Mexico*, 438 U.S. 696, 705 (1978).
[2]*Winters v. United States*, 207 U.S. 564 (1908).

and permitted them to second guess present counsel for the United States with respect to the proper magnitude of their *Winters* rights.

The Special Master's tour de force would make a shambles of the 1964 Decree and deal a severe blow to the economics of Southern California, Southern Nevada, and Central Arizona, whose limited water supply would be further substantially eroded. We turn now to his faulty analysis of the earlier proceedings and applicable law.

B. The Prior Litigation.

In 1952, the State of Arizona invoked the original jurisdiction of this Court for the purpose of establishing its entitlement to the waters of the Colorado River vis-a-vis the State of California and seven California public agencies. This Court determined that the complaint stated a claim cognizable under its original jurisdiction. Thereafter, the Court granted motions to intervene filed by the United States and the State of Nevada and joined the States of New Mexico and Utah to ensure complete and final adjudication of the conflicting claims to lower Colorado River Basin waters. *Arizona v. California*, 373 U.S. 546, 564 (1963). In its motion to intervene, the United States asserted federally reserved rights to the waters of the Colorado River on behalf of itself and a number of Indian Tribes, including those now parties to the present proceeding.[3] Thus, in the original proceeding the United States undertook to discharge its stat-

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[3]The Navajo Indian Tribe belatedly filed a motion to intervene and represent its own interests in the proceeding. That motion and a subsequently filed motion for reconsideration were denied by the Court on the ground that the Navajos' interests were represented adequately by the United States. 368 U.S. 950 (1962).

utory responsibility to present evidence to sustain federally reserved water rights claimed for Indian reservation lands.[4]

The Court thereafter appointed a Special Master to preside at the trial proceedings, take evidence, and make recommended findings of fact and conclusions of law which would provide the basis for entry of a decree finally adjudicating the parties' rights to lower Colorado River Basin waters.

On December 5, 1960, eight years after the filing of the complaint, Special Master Simon Rifkind (the "Former Master") submitted his report and a proposed decree adjudicating the parties' rights. As a matter of law, the Former Master determined that the United States intended to reserve unappropriated water for the lower Colorado River Indian Tribes at the time the reservations were created adequate "to provide for the future needs of the Indians." (Former Master's Report at 262.) In support of this conclusion, the Former Master relied on the implied water rights doctrine set forth in *Winters v. United States*, 207 U.S. 564 (1908), which he noted recognized federally reserved water rights for reservation lands in an amount "reasonably necessary to irrigate the lands included in the reserve. . . ." (*Id.* at 258.) Significantly, although the *Winters* case and subsequent decisions made it clear that the measure of an implied reservation of water for an Indian reservation was the quantity needed to satisfy the "reasonable needs" of the Indians, no single quantification formula had been established at the time of trial. The Former Master thus requested that the parties present evidence on the appropriate quantification standard.

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[4]The United States' representation of the Tribes is sanctioned by 25 U.S.C. § 175 (1976) and long-standing decisions of the Court, *e.g.*, *Heckman v. United States*, 224 U.S. 413 (1912); *cf. Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 368-370 (1968); see also discussion, *infra*, on intervention by the Indian Tribes.

Several quantification procedures were proposed. For example, the State of Arizona recommended that the Tribes' water rights be measured by estimating their reasonably foreseeable needs, subject to later revision, if necessary, while California contended that the measure of Indian rights on any basis should be their maximum historic use. The United States initially supported an open-ended decree, but later advocated adoption of a fixed and final determination of the Tribes' reserved water rights "so that no need would exist to come back at a later date to seek additional rights."[5] The Former Master determined that the fixed magnitude approach advocated by the United States was preferable to the open-ended approach. In reaching this conclusion, he observed that failure to specify the totality of federally reserved rights on reservation lands would place all junior rights in jeopardy and severely hamper financing of irrigation projects.[6]

The quantification standard advocated by the United States in the prior proceeding, recommended by the Former Master and adopted by the Supreme Court in its decision and subsequent decree is the "practicably irrigable acreage" standard. 373 U.S. 600-601. Application of this standard resulted in an award of 905,498 acre-feet in diversion rights for 136,636 acres on the five mainstream reservations, although the maximum acreage ever irrigated annually up to the time of trial for the reservations did not exceed 36,000 acres. (California Proposed Findings and Conclusions, April 1, 1959, Findings 4C:104, 4D:103, 13D:104, 14C:108, 18E:104, 18F:104; Former Master's Report, p. 268.)

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[5]See United States' Pre-Trial Brief (August 25, 1980) at p. 3; see also Appendix A.

[6]See Former Master's Report at 264; see also current Spec. Master's Report, p. 11.

At several times during the prior proceeding, the United States indicated that some procedure for modification of the Tribes' water rights might be necessary to take into account their unforeseeable needs or changed circumstances. The United States, however, offered no suggestions as to the type of modification procedure it felt might be appropriate. In any event, the United States made it clear that it intended to establish the maximum extent of the Tribes' reserved water rights through "detailed evidence regarding the irrigable lands." (See Prior Rep. Tr., pp. 12,461, 12,463 — Appendix A.) The Former Master emphasized that the United States would be "bound" by these expressions of intent and that the evidence offered in support of the Tribes' water rights claim would constitute a "Bill of Particulars." (Prior Rep. Tr., pp. 14,155-57 — Appendix A). Special Master Tuttle has determined that these and other statements by the Former Master indicate only that "he might be disinclined to allow the United States to use Article IX to correct an error in the Indian water determination." (Spec. Master's Rep., p. 32.) This cautious characterization is a masterpiece of understatement. We have set out in Appendix A extracts from the exchange between the Former Master and counsel for the United States on this very issue, which makes it abundantly clear that the amount of practicably irrigable acreage being claimed by the United States, if accepted, would not be subject to later modification other than for correction of technical errors of calculation.

The Former Master issued his report on December 5, 1960, accepting the United States' proof of "practicably irrigable acreage" as the measure of the Tribes' *Winters* water rights. (Former Master's Rep., p. 265.)

In 1963, this Court rendered its decision in the prior proceeding. With respect to Indian reserved rights, it upheld in every significant respect the Former Master's recom-

mended findings of fact and conclusions of law (373 U.S. at 595-601) and later embodied them in its 1964 Decree. 376 U.S. 340.

C. The Present Proceedings.

In late 1977 and early 1978, 14 years after the entry of the 1964 Decree, the Tribes moved for leave to intervene in these proceedings and asserted additional claims for water rights on lands which were within their reservations at the time of the prior proceeding, but which the United States had not classified as "practicably irrigable." (Motion for Leave to Intervene of Ft. Mojave, Chemehuevi, and Quechan (Ft. Yuma) Tribes, December 1977; Motion for Leave to Intervene of Colorado River and Cocopah Tribes, April 10, 1978.) The Tribes styled their claims as "new" claims for lands "omitted" from the prior proceeding. However, as the Special Master has recognized, the so-called "omitted lands" claims are not new claims, separate from the claims pressed in the prior proceeding. Rather, they are embraced within the prior claims, which were intended to establish water rights for the totality of practicably irrigable acreage within reservation lands. (Spec. Master's Rep., pp. 30-31.)[7] On December 21, 1978, the United States also asserted water rights claims for "omitted lands" and requested that the 1964 Decree be modified pursuant to Article IX to permit additional diversions of water from the mainstream of the Colorado River for the use of the Tribes. The State Parties collectively opposed the United States' and the Tribes' motions as they related to the omitted lands claims.

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[7]Indeed, the Special Master has gone so far as to find that the omitted lands claim does not constitute a "new issue", because the "total amount of practicably irrigable land was litigated and determined in the earlier proceeding." (Spec. Master's Rep., p. 31.)

On January 9, 1979, the Court referred the issue to the Special Master. 439 U.S. 419, 436. At a hearing held on April 17, 1979, the State Parties moved that the Special Master decide prior to the trial whether the claims were barred by the doctrines of *res judicata* or collateral estoppel. The Special Master rejected this recommendation. Instead, he deferred decision on the question and permitted the United States and the Tribes to introduce new evidence on the irrigability of the lands previously determined to be not practicably irrigable. (See order of August 28, 1979.)

This evidence, *inter alia*, consisted of soil analyses based on standards of the Soil Conservation Service of the United States Department of Agriculture ("SCS") and irrigation analyses utilizing the so-called "drip" irrigation technology — all designed to show that certain lands previously classified as not "practicably irrigable" should be reclassified. (Ft. Mojave, Chemehuevi, Colorado River, and Cocopah Tribes' Pre-Trial Brief, pp. 22-23; United States' Pre-Trial Brief, p. 17.) There is no dispute that, in the prior proceeding, the United States did not base its claim on "drip" irrigation technology or SCS soil analyses. At that time the United States introduced evidence to prove which reservation lands were irrigable under then existing or proposed irrigation project works, relying on Bureau of Indian Affairs soil analyses and assuming a then current standard of economic feasibility. (Prior Rep. Tr., pp. 14,119-25.) The evidence relating to irrigation science and technology introduced in the present proceeding by the United States and the Tribes differs significantly from that offered in the prior proceeding.

On February 22, 1982, the Special Master issued his recommended findings of fact and conclusions of law. He concluded that the omitted lands claims fall within the reserved water rights claims presented by the United States

on behalf of the Tribes in the prior proceeding. (Spec. Master's Rep., p. 31.) The Special Master also found that the "1964 Decree substantially settled the water rights among the States as well as the water rights of the Indians to water from the States' allotment" (Spec. Master's Rep., p. 15) and that the State Parties substantially relied on these findings in planning for present and future water requirements. (Spec. Master's Rep., pp. 38-46.)

Despite these findings, the Special Master nonetheless has recommended that the Court consider the merits of the United States' and the Tribes' claims for lands previously deemed not "practicably irrigable." The Special Master's recommendation is based on three subsidiary findings of fact and conclusions of law namely: (1) that Article IX of the 1964 Decree provides a valid basis for reconsideration of the magnitude of the Tribes' reserved water rights; (2) that the principles of *res judicata* and the doctrine of law of the case do not preclude such reconsideration; and (3) that failure to consider the claim (and dispose of it in a manner which is favorable to the Tribes) will result in manifest injustice to the Tribes. The State Parties contend that each of these findings is in error.

D. Article IX of the 1964 Decree Does Not Provide a Valid Basis for Consideration of the Claims for Lands Previously Determined to Be Not Practicably Irrigable.

The threshold question relating to disposition of the omitted lands claims is whether this Court's 1964 Decree, implementing its 1963 decision, precludes consideration of the claims. The Special Master has determined that the Decree, taken as a whole, does not bar consideration and that Article IX, in particular, establishes a procedure for analyzing the merits of the claims. (Spec. Master's Rep., p. 31.) The

State Parties believe that both findings are in error and contrary to the fundamental objective of the Decree to establish with finality the relative rights of the parties to the waters of the lower Colorado River.

We begin with an analysis of the language of Article IX, which provides:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree or any supplementary decree that may at any time be deemed proper in relation to the subject matter in controversy.

On its face, the language is expansive and provides seemingly unlimited authority for the Court to reopen, reconsider, revoke or modify previously litigated legal conclusions and factual findings. However, it cannot properly be interpreted in a vacuum without reference to the prior proceedings and the objective of the Former Master and this Court to conclusively establish the precise scope of the Tribes' reserved water rights. As the Special Master purports to recognize, "the context in which [the Former Master] wrote [Article IX] is important." (Spec. Master's Rep., p. 53.) When Article IX is viewed within this context, it it clear that the language, though broad in scope, was not intended to provide a modification "procedure" for the previously adjudicated Indian water rights.

1. In the Prior Proceeding the Former Master Rejected the United States' Recommendations for Unrestricted Modification Authority.

The United States in the prior proceeding assumed the evidentiary burden of establishing the amount of water necessary to serve the "reasonable needs" of the five mainstream Indian reservations. It persuaded the Former Master, over the strong objections of the State Parties, that the fairest

and most administratively feasible measure of those needs was the maximum amount of water adequate to irrigate all "practicably irrigable" acres on each reservation.

Statements made by counsel for the United States in the prior proceeding establish that it fully understood its evidentiary burden. For example:

> The [Former] Master: I take it from what you have just said that you are going to assert a claim for the maximum amount of water necessary for the irrigable acres in the reservation.
>
> Mr. Warner: That is correct, Your Honor.
>
> (Prior Rep. Tr. at 12,461 — Appendix A.)

Later, in the same discourse, the Government stated:

> [W]e think that under existing conditions on the Indian Reservations throughout the lower Basin, *the extent of the irrigable acreage is the only practicable basis*, as a general proposition, *for arriving at a reasonable judgment now of the possible needs of the Indians for the future*. It is for this reason that we propose to offer detailed evidence regarding the irrigable lands.
>
> * * *
>
> *To date none of the parties has been put to strict proof of irrigability. We anticipate that the United States*, in proving its claims on behalf of the Indians *will be*. (Prior Rep. Tr. at 12,463 — Appendix A. (Emphasis added.))
>
> * * *
>
> I think it is our duty to prove the Indian claims to the full extent we can prove them. (Prior Rep. Tr. at 12,564.)

When a question later arose about the scope of the United States' irrigable acreage evidence, the Former Master stated:

> *I shall assume* that the categories of lands indicated on the Indian reservations on *these maps constitute your*

> *Bill of Particulars* to what you regard as irrigable within the terms of the United States claim, *subject to correction* that you can bring to our attention *if there is some clerical error*, in the course of the trial; but otherwise, I shall assume that this is your Bill of Particulars. (Prior Rep. Tr. at 14,156-57 — Appendix A.) (Emphasis added.))

The United States never qualified its statements that its evidence was intended to establish the maximum extent of the Tribes' reserved water rights. (*E.g.*, Prior Rep. Tr. at 12,461 and 12,564 — Appendix A.) It did suggest on several occasions, however, that the Former Master might provide a procedure by which the United States might assert additional claims on behalf of the Tribes in the future. (Prior Rep. Tr. at 13,508 — Appendix A.) The Former Master rejected all such suggestions, which he characterized as tantamount to creating an "open-ended decree." (See Appendix A.) Against that background, it is significant, we believe, that the United States submitted no proposal for any kind of modification procedure for Indian rights in the proposed findings of fact and conclusions of law it submitted to the Former Master on April 1, 1959. Indeed, Article IX was proposed by the California Defendants,[8] who were strongly opposed to the basic concept of the United States' *Winters* claim.

In his 1960 report to the Court, the Former Master discussed the problems with an open-ended decree (p. 264):

> [S]uch a limitless claim would place all junior water ights in jeopardy of the uncertain and the unknowable. Financing of irrigation projects would be severely hampered if investors were faced with the possibility that expanding needs on an Indian Reservation might result

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[8]Findings of Fact and Conclusions of Law Proposed by the California Defendants (April 1, 1959), p. Decree — 26.

> in a reduction of the project's water supply. Moreover, it would not give the United States any certainty as to the extent of its reserved rights, which would undoubtedly hamper the United States in developing them.

The Former Master then recommended that the Court adopt the practicably irrigable acreage standard because it

> [would] preserve the full extent [of] . . . the water rights created by the United States and [*would*] *establish water rights of a fixed magnitude and priority so as to provide certainty* for both the United States and non-Indian users. (Emphasis added.) (*Id.*)

His determination to achieve finality with respect to the Indian claims was reflected in Article VIII(C) of his proposed decree, which provided that the "decree shall not affect . . . the rights or priorities, whether under state law or federal, *except as specific provision is made herein*, of any Indian reservation . . . ." (*Id.* at 360), to which the United States took no objection.[9]

The Court adopted the Former Master's recommendations with the statement that "[t]he various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable." 373 U.S. at 601. Thus, it seems clear that the Court determined that the magnitude of the *Winters* rights established under the "practicably irrigable" acreage evidence presented to the Former Master would meet the "reasonable needs" of the Tribes.

From the foregoing, it is abundantly clear that the Former Master intended that his recommended findings of fact and conclusions of law should be construed as establishing with certainty and finality the maximum quantity of the Tribes' reserved water rights.

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[9]See Transcript of Conferences on Recommended Decree in New York, N.Y. on August 19, 1960.

2. The Special Master Has Misinterpreted Article IX as Creating an Open-ended Decree.

The Special Master has grounded his decision to reopen the previously litigated and adjudicated issues of "practicably irrigable acreage" on Article IX of the 1964 Decree. He has further recognized that the history of the prior proceedings provides the appropriate factual framework for assessing the intent of Article IX. (Spec. Master's Rep., p. 32.) The Special Master then nevertheless essentially ignores the prior proceedings on the ground that the history of Article IX "before the prior Master [is] not conclusive and would support either a broad or narrow interpretation." *Id.* The preceding discussion plainly demonstrates that this statement is totally erroneous.

Having swept the prior proceedings aside, the Special Master turns to "outside authority" for guidance on the proper interpretation of Article IX. (Spec. Master's Rep., p. 33.) He finds it significant that Article IX is "virtually identical" to similar provisions in other interstate water cases adjudicated by this Court (*Id.* at 33) and, relying on the proceedings in those cases, determines that Article IX is broad enough to justify "virtually any modification in its 1964 Decree that this Court deemed proper in relation to the subject matter in controversy." (Spec. Master's Rep., p. 35.)

In reaching this determination the Special Master rejects the State Parties' claim that the similar provisions in previous interstate water dispute decrees were designed solely to deal with *unresolved* significant issues or to allow for *changing* equities in equitable apportionment cases. They are thus distinguishable from the present proceeding, which concerns the statutory apportionment effected by the Boulder Canyon Project Act and the need for a fixed quantification of Indian reserved rights in order "to provide cer-

tainty for both the United States and non-Indian users" in the administration of that Act. (Former Master's Report, p. 265.)

For example, the Special Master in *Wisconsin v. Illinois*, 281 U.S 179 (1930), recommended the inclusion of language substantially identical to Article IX in order to deal with major problems that he had not been able to adjudicate:[10]

> It is recommended that the Court should retain jurisdiction as there are questions *which it is impossible to dispose of at this time in full justice to the parties*; as, for example, with respect to the extent to which the diversion of water from Lake Michigan by the Sanitary District may be reduced below 5,000 c.f.s., in addition to pumpage, after the installation of controlling works in the Chicago River and pending the completion of the sewage treatment works, and also with respect to any further or other provisions as to the diversion which may be found to be appropriate after the sewage treatment works have been completed and the results of their operation with respect to the effluent and the condition of the navigable waters have been observed. As construction work will be conducted on a large scale for several years, and *unforeseen contingencies may arise*, it would also seem to be important that there should be opportunity for the parties to come before the Court at any time to obtain such further directions as the facts may warrant.

Similar considerations prompted the Special Master in *New Jersey v. New York*, 283 U.S. 336 (1931), to recommend inclusion of such an article:[11]

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[10]Report of the Special Master on Re-Reference (filed December 17, 1929), p. 145. (Emphasis added.)

[11]Report of the Special Master (filed February 2, 1931), pp. 198-99. (Emphasis added.)

> In reaching the conclusions herein stated I realize that it will be necessary to retain the cause in court for the consideration of applications which may be made for the modification of the decree *in the particulars in which I have indicated that the decree should have flexibility and susceptibilty of modification*. Of course, it is desirable that all questions should be settled and that litigation should be ended, but in a case of this kind in which the future is necessarily fraught with uncertainties and in which the welfare of so many people is involved, I am of the opinion that justice requires that the cause should not be ended by a decree final and unchangeable in all its particulars.

However, it is significant that he stressed that only those matters which had not been adjudicated without prejudice would be subject to reconsideration under that article (*Id.* at 209) (emphasis added):

> The cause will be retained in court for proper applications relative to matters left open to change or modification and relative to those features as to which there has been a *decision without prejudice*. Such applications may be made by any party to the cause.

The recommendation for retention of jurisdiction by the Special Master in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), was also grounded on the recognition of the need to adapt to changing equitable considerations, such as water supply:[12]

> The foregoing conclusions 6, 7, 8 and 9 assume that an apportionment now made should be based primarily upon the conditions of water supply which have prevailed since 1930. Recommendation is further made of retention by the Court of jurisdiction to amend the

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[12]Report of Michael J. Doherty, Special Master (filed October 16, 1944), pp. 10-11.

> decree upon a showing of such change of conditions as might render the operation of the decree inequitable. This recommendation contemplates particularly the possibility of the passing off the present drouth cycle and the future availability of far greater water supplies, comparable with those of former years which might justify a release of some or all of the restrictions now proposed. Many elements of uncertainty and probable impermanence in the present situation argue either for a dismissal of the suit or a decree with provision for such retention of jurisdiction. The reasons favoring a decree appear the stronger.

It is apparent from the foregoing that the language of Article IX, and the comparable provisions in earlier interstate water cases after which it was patterned, must be read against the background of the issues that had been passed on by each Special Master and the reasons advanced by them for its inclusion. The California Defendants proposed the inclusion of language substantially identical to Article IX before the Former Master because they had contended that the litigation should be decided in accordance with the principles of traditional equitable apportionment cases which had been before the Court, the most recent of which, *Nebraska v. Wyoming*, 325 U.S. 589 (1945), had provided for retention of jurisdiction in a clause substantially identical to Article IX. The Former Master ultimately rejected the applicability of the equitable apportionment doctrine to the major issues before him, concluding that they were governed solely by the Boulder Canyon Project Act, the California Limitation Act, and the water delivery contracts executed by the Secretary of the Interior with the parties under section 5 of the Project Act. (Former Master's Report, p. 138.)

Although the Former Master's report does not spell out his purpose for including Article IX in light of his decision

on the "irrelevance" of the equitable apportionment doctrine, it seems likely that it was intended as a safety-net to provide a convenient means for dealing with matters not litigated below and dealt with in the Decree, such as those expressly excluded in Article VIII or latent boundary issues like those which have surfaced on the Chemehuevi and Fort Yuma Reservations since the original proceeding. It also provided a mechanism to seek relief from or compliance with those provisions of the Decree which had been couched in injunctive terms against the parties. In any event, there is no mystery as to what Article IX was *not* to be used for, namely, the very relitigation of the "practicably irrigable acreage" on each reservation which Special Master Tuttle would permit. The record below could not make this any clearer, as the Special Master *almost* concedes, observing that "some of the remarks of the [Former] Master indicate that he might be disinclined to allow the United States to use Article IX to correct an error in the Indian water rights determination." (Spec. Master's Rep., p. 32.)

Had the Special Master accorded the strong statements of the Former Master during the trial and in his Report their appropriate weight, he would have been compelled to interpret Article IX as precluding this Court from reaching the merits of the omitted lands claims. On this basis alone, those claims should be rejected.

E. The Principles of Res Judicata Preclude Consideration of the Omitted Lands Claims.

The State Parties contended before the Special Master that consideration of the omitted lands claims was precluded by the principles of res judicata. There is no dispute between the State Parties and the Special Master over the essential elements of the doctrine of res judicata, and we see no need to restate them here. (The State Parties' res judicata argu-

ments are set out in their memoranda — cited in Spec. Master's Rep., p. 30, note 1.) With respect to those elements, the Special Master has rejected the contentions of the United States and the Tribes that the omitted lands claims are "new" claims. (*Id.* at 30-31.) Although he has also recognized that the Tribes were represented by the United States as trustee or guardian in the prior proceeding, he suggests that the Tribes' lack of status as actual parties to that proceeding provides a "compelling reason" for the Court to consider the merits of the omitted lands claim. (Spec. Master's Rep., p. 48.) The State Parties take strong exception to this conclusion. It is well established that the mere absence of the Tribes from the prior proceeding provides no legally supportable rationale for relitigating a previously adjudicated issue. For example, in *Heckman v. United States* this Court carefully considered the nature of the relationship between the United States and Indian Tribes and held:[13]

> There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents, whom Congress, with respect to the restricted lands, has not yet released from tutelage. *Its efficacy does not "depend upon the Indians' acquiescence.* . . . It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.

Commenting specifically on the effect of the United States' representation of Tribal rights, the Court determined that the United States binds not only itself "but the Indians whom it represents in the litigation," thereby recognizing

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[13]224 U.S. 413, 444-45 (1912) (Emphasis added); *cf., United States v. Emmons*, 351 F.2d 603, 604 (9th Cir. 1965).

that the United States and Indian Tribes were in privity (*Id.* at 446.)

In recent years several courts have permitted Tribes to represent themselves in judicial proceedings. For example, in *State of New Mexico v. Aamodt*[14] the Tenth Circuit granted the Pueblo Indians' motion for intervention (and independent legal representation) when the United States conceded "that a conflict of interest exists between the proprietary interests of the United States and of the Pueblos." In such a case, the court determined that "adequate representation of both interests by the same counsel is impossible." (537 F.2d at 1106.) The *Aamodt* decision plainly does not create a sweeping new precedent for independent representation of Indian Tribes in proceedings where other federal interests also are at stake. It merely stands for the limited proposition that where the United States concedes it has a conflict of interest with those of Indian Tribes, the Tribes should have a right to concurrently assert their rights.

Similarly, the Ninth Circuit Court of Appeals recently held:[15]

> In general, representation of the United States will bind an Indian tribe and the individual Indians. See *Heckman v. United States, supra*, 224 U.S. at 445-46, 32 S.Ct. at 434-35; *United States v. Emmons*, 351 F.2d 603, 604 (9th Cir. 1965); *Oklahoma v. United States*, 155 F.2d 496, 498 (10th Cir. 1946); *Creek Indians National Council v. Sinclair Prairie Oil Co.*, 142 F.2d 842, 845 (10th Cir.), *cert. denied* 323 U.S. 78, 65

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[14]*State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977). See also *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir. 1979), *cert. denied*, 444 U.S. 995.

[15]*United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1307 (9th Cir. 1981.)

> S.Ct. 269, 89 L.Ed. 624 (1944); *Pueblo of Picuris v. Abeyta*, 50 F.2d 12, 13 (10th Cir. 1931); *Vinson v. Graham*, 44 F.2d 772, 779 (10th Cir. 1930), *cert. denied*, 283 U.S. 819, 51 S.Ct. 344, 75 L.Ed. 1435 (1931); *Winship v. Ricketts*, 32 F.2d 476, 479 (8th Cir. 1929). When the government breaches its trust to the Tribes while openly advancing its own interest the Tribe is not necessarily bound . . .

The Court made clear that Indians do not have an inherent right to separate representation in proceedings affecting their interests, but may be permitted to intervene where there is evidence of a conflict of interest, fraud or collusion.[16]

The instant proceeding thus is factually distinguishable from the *Aamodt* and *Truckee-Carson* cases. Unlike those cases, the United States here denies and the Special Master has not found any conflict of interest between the United States and the Tribes in the prior proceeding.[17] Moreover, this Court found no merit to the Navajo Tribe's contentions in the prior proceeding that representation of their interests by the United States would be inadequate. Rather, it specifically affirmed the adequacy of the United States' representation by denying the Navajos' motion to intervene. That ruling is the "law of the case" and should have been honored by the Special Master.

For these reasons, it is clear that the Tribes, though not actual parties, were in privity with the United States during the prior proceeding.

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[16]*Id.* at n. 18. *See also Cheyenne River Sioux Indians v. United States*, 338 F.2d 906 (8th Cir. 1964), *cert. denied*, 382 U.S. 815 (1965).

[17]Memorandum for the United States on Motions for Leave to Intervene (May 1978) at 10. The Special Master states that the State Parties came close in their pretrial brief to making an admission that the United States failed to carry out its trust responsibility in the prior proceeding. Spec. Master's Rep., p. 52, note 67.

Despite the fact that the omitted lands claims are not new claims and that the United States and the Tribes were in privity, the Special Master found that res judicata does not preclude litigation of the claims. He concludes that "if these claims were presented in a proceeding separate from the original case, they would have been subject to the normal rules of preclusion," but finds a crucial distinction because the claims are made within "the same action in which the prior claims were adjudicated." (Spec. Master's Rep., pp. 30-31.)

There is a certain superficial plausibility to the Special Master's reasoning. However, the Special Master has completely overlooked the fact that the Tribe's basic *Winters* rights claims, within which their present claims are merged (*Id.* at 30), were fully adjudicated in the prior proceeding. Thus, in contrast to the other boundary issues now pending before the Court, which were never resolved, the Tribes and the United States seek a "second day" in this Court to relitigate the magnitude of the Tribes' reserved water rights claims. The Special Master's conclusion that the principles of res judicata are inapplicable solely because the present proceeding still carries the "No. 8 Original" docket designation of the original proceeding would exalt form over substance and should be rejected. Reason, fairness, and practical necessity all require an end to litigation of the same issue between the same parties, no matter what procedural mechanism is invoked in the attempt to relitigate previously adjudicated claims.

The Special Master has given no apparent consideration to the disruptive legal precedent inherent in his recommendation. Specifically, if this Court accepts the Special Master's recommendation not to invoke the doctrine of res judicata or law of the case to block the omitted lands claims, then the door is inexorably opened to continued relitigation

of the practicably irrigable acreage issue. All the United States or the Tribes would need to show in the future is some "new evidence" of technological innovation in irrigation science or crop production not previously laid before the Court that allegedly will demonstrate that reservation lands for which no water rights were previously asserted are now "practicably irrigable." Finality could never be achieved because Article IX of the Decree would provide a master key for indefinitely unlocking adjudicated issues.

Both the United States and the Special Master disclaim any attempt to so interpret Article IX. The United States has conceded that "countervailing considerations counsel a halt to indefinite reconsideration of matters already decided."[18] Similarly, the Special Master acknowledges that "obviously the decree must be considered closed on these matters at some time." (Spec. Master's Rep., p. 53). When and in what circumstances "enough is enough" is not indicated. In reality, these lofty disclaimers are meaningless. Reliance on Article IX under the present factual circumstances demonstrates that it would be difficult, if not impossible, to conjure up any factual situation under which Article IX would not provide a basis for relitigation of a previously resolved issue.

Rather than interpret Article IX in a manner which is "pregnant with further litigation," *Oklahoma v. Texas*, 256 U.S. 70, 90 (1921), the State Parties believe this Court should construe it consistent with the principles of res judicata and its prior intention to foster reliance on the 1964 Decree. See *Montana v. United States*, 440 U.S. 147, 153 (1979). For these reasons, the State Parties contend that the

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[18]Motion of the United States for Modification of Decree and Supporting Memorandum (December 1978), p. 28.

Special Master erred in refusing to apply the principles of res judicata to bar relitigation of the magnitude of "practicably irrigable acreage" on each reservation.

F. Even if Res Judicata Is Inapplicable, the Doctrine of Law of the Case Should Bar Relitigation of the Omitted Lands Claims.

Although the Special Master refused to apply the doctrine of res judicata to the omitted lands claims on the grounds that they are made within the same proceeding, he did find that the "law of the case" doctrine should be considered to determine if the claims are precluded from further relitigation. (Spec. Master's Rep., p. 36.) In his view, the Court should exercise its discretion under that doctrine to permit consideration of the omitted lands issue (*Id.* at 54.)

The State Parties believe the Special Master has incorrectly applied the law of the case doctrine. Admittedly, that doctrine, unlike the doctrine of res judicata, does not compel adherence to a prior decision. Rather, as the Special Master recognizes, it is a matter of good practice which directs the exercise of the Court's discretion. (*Id.* at 36.) However, although the law of the case is not an "inexorable command," *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967), a court's discretionary authority to recall a mandate "should be exercised sparingly." *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 585 (D.C. Cir. 1980). Cases which traditionally call for reconsideration of a previously litigated issue are those where the controlling legal authority has changed subsequent to first review of the issue or where "grave injustice" would result from failure to reconsider a previously litigated issue. (*Id.*)

The question in the instant proceeding, therefore, is whether there is a compelling basis for waiving the law of the case doctrine and permitting reconsideration of the mag-

nitude of the Tribes' reserved water rights claims. The United States and the Tribes do not contend that an intervening change in law requires waiver of the law of the case doctrine. Indeed, two subsequent decisions of this Court point to a contraction, not an expansion, of the Indian rights. *United States v. New Mexico*, 438 U.S. 696 (1978); *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979). Thus, the only basis for departing from the law of the case doctrine would be that failure to do so would result in a "grave injustice" to the Tribes. And, seemingly, it is on this basis that the Special Master has determined this Court should reconsider the extent of the reserved water rights allotted to the Tribes, which he concludes "received less than a full measure of justice before the Court."[19]

The extensive record developed before the Special Master fails to establish that the Tribes will suffer "grave injustice" of any kind if the omitted lands claims are barred, so there is no legally cognizable basis for "overriding the strong policy of repose normally accorded past decisions." *Laffey, supra*, at 585. First, the United States and the Tribes make no claim, and no evidence has been introduced which even remotely suggests, that the purposes of any of the reservations would be frustrated or that they would not be "livable" (Spec. Master's Rep., p. 90) in the event review of the claims is precluded. Second, there is no assertion or evidence that failure to consider the claims will jeopardize or in any way interfere with the ability of the Tribes to meet

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[19]Spec. Master's Rep., p. 48. The State Parties emphasize here that they dispute the Special Master's assertion that they "admit" that the Tribes were treated unjustly. We agree that many of the omitted lands are "practicably irrigable" under the evidence presented in this proceeding, but do not agree that they were improperly classified as not practicably irrigable under the evidentiary standards chosen by the United States in the prior proceeding.

their "reasonable needs," present or foreseeable. Indeed, the water rights awarded the Tribes in the prior proceeding are more than sufficient to fully accommodate their needs by any reasonable standard. Thus, the basic purpose of the *Winters* Doctrine has been fully served.

Much of the evidence submitted in the present proceeding is no more than a narrative that additional water might be useful to potential or projected future development of the reservations. (*E.g.*, Rep. Tr., pp. 1428-29, 1438, 1440-42, 1451-53.) The possible limiting of speculative future development manifestly is not the kind of hard evidence demonstrating that a "grave injustice" occurred in the prior proceeding which is essential to justify reconsideration of a previously litigated issue.[20] The best characterization that can be given to the evidence is that it is cumulative to that introduced in the prior proceeding and, in most instances, shows only that under different, new approaches, the omitted lands are irrigable.

In contrast, the Special Master's recommendation would take water from existing non-Indian users in California and from the soon to be completed Central Arizona Project, (who he concedes relied in varying degrees on the 1964 Decree [Spec. Master's Rep., p. 46]) largely to enable the Tribes to increase the revenue they receive from leasing their water rights to *other* non-Indian users. In weighing the equities in this situation, the Special Master concludes that the Tribes "received less than a full measure of justice before the Court" in the earlier proceeding because the claims presented by the United States allegedly "fell short of the maximum possible claims" under the "practicably

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[20]*Laffey, supra; Otten v. Stonewall Insurance Company*, 538 F.2d 210, 213 (8th Cir. 1976); *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 19-20 (5th Cir.), *cert. denied*, 419 U.S. 987 (1974).

irrigable" standard — a fact which he finds "constitutes sufficient good reason to risk upsetting whatever reliance may have been based upon the Court's prior conclusion." (Spec. Master's Rep., p. 48.) But this is not "equity" by any standard no matter how the Special Master may strain to so portray it. Rather, since the Special Master has found it necessary to balance the equities in deciding whether to depart from the law of the case, he should follow the principle that this Court has followed in weighing equities in equitable apportionment cases, namely not to countenance the substantial impairment of existing uses for the benefit of prospective future developments. *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 419 (1922).

The evidence introduced by the Tribes and the United States in support of the omitted lands claim does not show that the prior determination was "fundamentally unfair" to the Tribes or not adequate to meet their reasonable needs. Instead, it simply shows that through utilization of *new* approaches, some lands might now be considered "practicably irrigable" which previously were not so classified. For example, the Tribes stated that their new evidence would "show that certain factors special to the Colorado River Reservations as well as *current* trends in national and international agricultural production and demand operate to make long-term agriculture development very favorable on . . . the omitted lands." (Ft. Mojave, Chemehuevi, Colorado River, and Cocopah Tribes' Pre-trial Brief, pp. 22-23, emphasis added.) Similarly, in its pre-trial brief, the United States stated (p. 17, emphasis added):

> "Under [additional soil analyses], certain lands . . . previously examined pursuant to BIA standards . . . were analyzed pursuant to standards of the Soil Conservation Service of the United States Department of

> Agriculture. Under these *more modern* standards, certain areas classified as 'non-irrigable' under the older BIA standards were considered to be irrigable."

Significantly, since much of the evidence submitted to overturn the earlier classification is different from that introduced in the prior proceeding, a decision to consider the omitted lands claims necessarily carries with it a decision to alter — not implement — the basic evidentiary criteria for "practicable irrigability" that formed the cornerstone of the prior proceedings.

The Special Master rejected the State Parties' assertion that the United States actually determined in the prior proceedings that the lands in question were not practicably irrigable. (Spec. Masters Rep., p. 51.) He was deprived of the best evidence available of the United States' trial strategy when he sustained a claim of privilege by the United States with respect to a detailed memorandum on that subject by a principal participant in the preparation of that case. (SP Exh. 123; Rep. Tr. 4497-4525). Instead the Special Master purports to discover certain "mistakes" in the prior proceeding that he finds demonstrate that the United States offered evidence sufficient to establish a "fair" but not the "best" claim for the Tribes. (Spec. Master's Rep., pp. 48-49.) According to the Special Master, a principal witness for the United States revealed that "the United States had mistakenly failed to include all irrigable land in its claims." (*Id.* at 49.) However, a careful review of the transcript (See Appendix A) in the earlier proceeding demonstrates that the Special Master has fundamentally misunderstood or misconstrued the witness's testimony.

The witness was questioned on cross-examination about the reliability of the United States' evidence on the practicably irrigable acreage asserted for the various reservations. The stated purpose of the examination was to deter-

mine whether the United States was asserting the maximum claim for the Tribes, *i.e.*, "to find out . . . whether we [the States] may rely upon these lands on these maps as limiting that claim or not." (Prior Rep. Tr. at 14153.) The witness's responses to those questions make clear that under the practicably irrigable acreage standard, defined by the United States as "those lands which could be served by the existing or proposed project" (Prior Rep. Tr. at 14152), the witness "did not make a mistake" (Prior Rep. Tr. at 14154). The witness's statements that other lands on the reservations may have been "irrigable" but not included in the reserved water rights claim provides no basis for concluding, as the Special Master has, that the United States failed to assert water rights for all "practicably irrigable" acreage. At most, they demonstrate, contrary to Special Master's conclusion, that the witness was trying to explain "that irrigable is not necessarily the same as practicably irrigable." (Spec. Master's Rep., p. 49.) Even today, certain other reservation lands could be considered "practicably irrigable" under an *evidentiary* standard different from the standard advanced by the United States and adopted by the Former Master and the Court in the prior proceeding, particularly where, as here, the passage of a quarter of a century has improved soil classification science and irrigation technology.

The Special Master purports not to understand what the State Parties mean by their assertion that the United States' judgment as to the proper scope of "practicably irrigable acreage" was a "reasoned tactical decision." (Spec. Master's Rep., p. 51.) He also criticizes counsel for the United States in the prior proceeding for presenting claims on behalf of the Indians "that were 'fair' to the Indians and 'fair' to everyone else." In the Special Master's view this was wrong, since "as trustee the United States was obligated to assert maximum claims, not merely claims that it believed

were 'fair'." (Spec. Master's Rep., p. 49.) But the Special Master's criticism is presumptuous and inappropriate. At the time of the prior trial in the 1950's, the contours of the *Winters* Doctrine were even murkier than they are today. Only two Indian water rights cases had previously reached the Supreme Court.[21] The proper measure of an impliedly reserved *Winters* right was obscure, and one Ninth Circuit decision had rejected the irrigable acreage test as a measure of the "reasonable needs" of the Indians in favor of historical experience.[22] Thus it is clear that the United States was breaking new ground in a difficult area, particularly since it was attempting to secure relatively large quantities of water for some 26 Indian reservations scattered throughout the entire lower Colorado River basin. In that context it was obviously essential to measure "reasonable needs" by a standard that was itself "reasonable." Recognizing that even the irrigable acreage standard is only a rough, though liberal approximation of "reasonable needs," it was essential to employ a rule of practicality with respect to the physical and economic basis for such a classification.

In such an uncertain situation there was obviously some risk that the Special Master would not accept an unreasonably broad claim for the Indians and might be persuaded by the quantification formulas being urged by Arizona and California, which would have awarded substantially less water to three of the mainstream reservations and none to two of them.[23] In that context, being "fair" was obviously

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[21]*Winters v. United States*, 207 U.S. 564 (1908); *United States v. Powers*, 305 U.S. 527 (1939).

[22]*United States v. Walker River Irr. Dist.*, 104 F.2d 334, 340 (9th Cir. 1939).

[23]Counsel for the United States clearly advised the Former Master that the voluminous evidence of past irrigation on each reservation that the United States offered was prompted by a recognition that the Former Master might not adopt the United States' "practicably irrigable acreage" test. (Prior Rep. Tr., pp. 12,560-64 - Appendix A.)

consistent with the Indians "best" interests. The kind of overreaching displayed by the United States and the Tribes in the present proceeding was not yet in vogue.

Elsewhere the Special Master is more charitable and seems to recognize the high judgmental element involved in trying a case to implement the "practicably irrigable acreage" standard. In discussing the several reservation boundary disputes, he recognizes that the Former Master adopted that standard only as "a *rough* measuring stick, a tool toward an informed equitable *estimate* of the Indians' needs." (Spec. Master's Rep., pp. 64-65.) (emphasis added.)

In bluntest terms, the present generation of Justice Department lawyers and the current Special Master are simply engaging in "Monday morning quarterbacking" a quarter of a century after the former United States' trial counsel had to make the difficult litigation decisions that ultimately led to an award for the Tribes that was unprecedented in Indian water rights litigation. It would offend all sense of fair play and procedure to permit that to be done under the guise of avoiding a purported "grave injustice" to the Tribes.

It is clear from the foregoing that there is no basis for departing from the law of the case to permit consideration of the omitted lands claim.

G. The Prior Findings on Practicably Irrigable Acreage Should Not Be Reopened Because the State Parties Have Relied on the 1964 Water Allocations and the Tribes Have Another Avenue of Relief if the United States' Prior Representation Was Legally Inadequate.

The Special Master has made clear that the primary reason he recommends that the Court consider the merits of the omitted lands claim is that failure to do so would result in

unfairness to the Tribes. (Spec. Master's Rep., p. 48.) Evidence of this unfairness, he states, is manifested by the fact that the Tribes were not actual parties to the prior proceeding and that all parties to the present proceeding concede that under the *new* evidence and economic assumptions, all or some of the omitted lands may be "practicably irrigable."

The State Parties have demonstrated that the absence of the Tribes as actual parties to the prior proceeding in no way establishes that they were not fairly treated or adequately represented. Further, the fact that some of the lands previously considered to be not practicably irrigable might be reclassified under the new evidence is not tantamount to an admission necessitating relitigation of the magnitude of the Tribes' reserved rights. At most, it establishes only that under different, more modern evidence and assumptions than those utilized by the United States and adopted by the Court in the prior proceeding, some lands not classified as "practicably irrigable" at that time might be today. If anything, recognition of this fact points to the inherent defect of reopening this previously litigated issue, namely, providing legal precedent for unlimited future relitigation of Indian reserved water rights each time "new" soil science and irrigation technology evidence is brought to the attention of the Court, not only in this case but in the host of cases where the *Winters* Doctrine has been or is being litigated. The Court ought not to enter lightly upon such a precedential action.

Significantly, although the Special Master evidences great concern that the Tribes be treated fairly, he shows little concern that the State Parties be treated fairly. While he did not dispute that the State Parties relied on the 1964 Decree and will bear the loss of water rights if the omitted lands

claims are sanctioned, he determined that "this reliance . . . might not be sufficient to foreclose the present claims." (Spec. Master's Rep., pp. 38, 46.)

1. Reliance by the State Parties on the 1964 Water Allocations.

An examination of the relevant facts discloses that the State Parties did rely on the prior Decree and will suffer substantial harm if the omitted lands claims are decided in favor of the Tribes. Those claims were not asserted until 14 years after entry of the Decree. During that period, the State Parties developed water supply plans which reflected the terms and conditions of the 1964 Decree. (Spec. Master's Rep., pp. 38-46.) Any increase in the Tribes' water rights will be borne gallon for gallon by the State Parties. (Spec. Master's Rep., p. 38.) Thus, review of the omitted lands claims will require this Court to disrupt the integrity of the 1964 Decree to cure an arguable, potential "unfairness" to the Tribes and, in so doing, produce an immediate and substantial adverse impact to the State Parties, who properly viewed the prior adjudication as establishing a final determination of the Tribes' water rights.

The record is replete with evidence that the factual findings quantifying the Tribes' reserved rights served as the foundation of the State Parties' efforts in developing projects to exercise their rights and in planning for other projects to supplement those rights.

Donald C. Brooks, Director of the Planning of the Metropolitan Water District of Southern California ("MWD"), testified that the District provides about 45 percent of the water supply for the 12 million residents of the Southern California coastal plain from two sources — the Colorado River and the State Water Project. (Rep. Tr., pp. 2909, 2914.) In 1960, MWD contracted for a supply of water from the State Water Project to supplement its Colorado River

supply. After the Supreme Court's decision and Decree in *Arizona v. California*, MWD amended its State contract in 1965 to provide for additional water to replace the quantity it had lost under the Court's Decree. (Rep. Tr., pp. 2925-2926.) At that time, there was additional capacity available in the State Water Project which MWD could have contracted for. (Rep. Tr., p. 2941.) If the "omitted lands" claims now asserted by the United States and the Tribes are sustained, MWD could not obtain an additional long term, firm water supply from the State Water Project to replace that quantity unless a second, costly aqueduct were built from the Sacramento-San Joaquin Delta to Southern California. (Rep. Tr., pp. 2929-30, 2942-43.) Moreoever, even if aqueduct capacity were to be available, the State has not yet developed the full supply necessary to meet its presently contracted commitments, much less additional supplies. (Rep. Tr., p. 2942.)

The Special Master indulges in curious reasoning regarding MWD's reliance on the 1964 Decree of the Court by referring to unresolved boundary questions. He states that the District's replacement of water lost by the 1963 decision and 1964 Decree in this case only took into account the water lost to Arizona and not to the Indian Tribes and that it failed to make plans for increased awards to the Tribes should they prevail on the unresolved reservation boundary questions. "From this evidence one could find that the District simply ignores the Indian water rights in its planning process and thus does not rely on an award at a specific level." (Spec. Master's Rep., p. 43.)

But the Special Master does indicate his understanding that MWD acted to make up its huge loss of 662,000 acre-feet to Arizona by increasing its state contract entitlement (Spec. Master's Rep., p. 42), and nowhere does he refer to evidence of what impact the Indian Tribe awards in the

1964 Decree would have on MWD. (In fact, the overwhelming impact is upon Arizona.)

As for MWD not making plans for any additional awards being made to Indian reservations based upon resolution of disputed boundaries of the reservations referred to in Article II(D)(5) of the 1964 Decree, the Special Master overlooks or ignores the results of trial of the boundaries issue before the Former Master. The determinations were generally in favor of the State Parties. Could MWD be reasonably expected to bear the great expense of obtaining an alternative water supply of an unknown quantity on the contingency that someday the boundaries issue would be retried and with a different result than in the original proceedings or that this Court's adjudication of water rights for each reservation would relitigated?

No less puzzling than the above comments of the Special Master is his adoption of the United States' statement that "the record does not indicate the decrease in [the District's] supply if the additional claims are upheld." (Spec. Master's Rep., p. 42.) The Special Master notes that MWD's priority to Colorado River water accords with the Seven Party Agreement. Pursuant to that agreement (Prior Ariz. Exh. 27; Wilbur and Ely, *The Hoover Dam Documents* (1948 Ed.), A 479, A 507, A 535.), MWD's contracts for 1,212,000 acre-feet are fourth and fifth priorities, junior to rights of 3,850,000 acre-feet held by other California agencies. Therefore, when California agencies are limited to the State's annual entitlement of 4.4 million acre-feet, MWD's supply will be reduced to 550,000 acre-feet. Similarly, any additional award to Indian reservations, since they have the highest priority [*Arizona v. California, supra,* 439 U.S. at 421 (1979)] will reduce the District's supply, *pro tanto*.

MWD, of course, does not take Indian water claims and awards so lightly as the Special Master would have the

Court believe. While the effect of the 1964 award on MWD, some 55,000 acre-feet in consumptive use terms, was regarded as relatively minor when it was confronted with the huge loss of 662,000 acre-feet to Arizona, such is not the case today. The Special Master's additional allocation to the Indian reservations in California is 123,314 acre-feet per year. Allowing for one-third return flow, this amounts to approximately 82,200 acre-feet of consumptive use. Thus, MWD could lose about 137,000 (55,000 + 82,200) acre-feet annually. On its face, this is not an insubstantial supply, but considered in context of the State of California having developed only about half of the supply it is committed to on the water project relied upon by MWD (Rep. Tr., p. 2942), and the water supply of the City of Los Angeles, and particularly its rights of some 150,000 acre-feet annually from the Owens Valley being subject to pending litigation which could result to its turning to MWD to make up any losses (Rep. Tr., p. 2940), it can only be regarded as a serious threat to MWD's meeting its obligations.

Unfortunately, the impact upon MWD of any additional award of water to Indian reservations situated in California is unmistakable and manifest.

The Special Master has characterized [m]uch of the discussion regarding reliance [as] "superfluous" in evaluating the evidence offered by the State Parties on this issue yet it is this evidence which demonstrates Nevada's reliance on the 1964 Decree and the detrimental impact to be incurred if the present claims are granted. The Special Master makes two egregious errors by not considering all the evidence: he fails to consider the impact of all existing contract rights for diversions of Colorado River water held within Nevada, and he assumes that a specific return flow percentage should be applied to all diversions of Colorado River water within

the State. Consideration of the following evidence answers the uncertainty expressed by the Special Master (Spec. Master's Rep., p. 46) and sufficiently forecloses consideration of the present claims.

The statement of Mr. Duane Sudweeks, director of the Colorado River Commission of Nevada (Division of Colorado River Commission at time of trial), that Nevada has relied on the 1964 Decree, is in fact accepted by the Special Master. (Spec. Master's Rep., p. 44.) This reliance led to the construction of the Southern Nevada Water Project (Project) enabling the State to divert 299,000 acre-feet annually from the Colorado River for use in the Las Vegas Valley. The total capital investment by the State in the Project is expected to exceed $215,000,000. Sudweeks further testified that present contract diversion rights to the Colorado River approach 400,000 acre-feet annually, yet the Special Master only considers the Project's diversion figure in concluding the Project would not be impacted if the "omitted lands" claims in Nevada were granted. (Rep. Tr., p. 3060.) These other contract diversion rights must be considered in determining what, if any, of the State's 300,000 acre-feet annual allocation is available and the impact of these additional claims. (*See*, U.S. Exh. 96.) Some of these diversion rights "have basically no or very little return flow to the river system." (Rep. Tr., p. 3060.) Therefore, the Special Master's conclusion that sufficient water is available to satisfy the present claims is speculative at best.

Any additional water rights granted the Fort Mojave Tribe in Nevada may have a detrimental impact on existing water users and the future ability of the State to meet the water needs of a rapidly expanding population. The Project's diversion right to 299,000 acre-feet would be decreased if all existing superior water rights are exercised. Such decreases

may occur in a normal water year and would certainly occur in a water short year. The inability of the Project to divert its contract amount would severely affect the several municipalities in the Las Vegas Valley and render useless its portion of the Project which the State is committed to repay.

The Special Master determined "Nevada has presently set aside for the Indians a total consumptive use figure of 12,500 acre-feet of water per year" and therefore the State can satisfy the present claims. (Spec. Master's Rep., p. 45.) This conclusion misconstrues the facts and assumes some return flows to the Colorado River will occur. It must be pointed out that no undisputed methodology has been identified for measuring or quantifying return flows on the Colorado River. Furthermore, the Special Master's use of the 35 percent return flow reflects a much higher percentage than is experienced by other contract diversions in the State. As previously explained, some diversion rights "have basically no or very little return flow to the river's system." (Rep. Tr., p. 3060.) The higher percentage used by the Special Master is only applicable to the Project, a modern water conveyance system and is inappropriate as a measure of return flows in this case. Therefore, the State is clearly justified in holding the decreed amount of 12,500 acre-feet as a consumptive use against the State's 300,000 acre-feet allocation. Any additional water rights granted the Fort Mojave Tribe would then further reduce the State's total allocation and directly impact existing water users.

Similarly, Wesley E. Steiner, Director of the Arizona Department of Water Resources, testified that Arizona relied on quantities allocated to the mainstream Indian reservations in the 1964 Decree in seeking Congressional authorization of the Central Arizona Project in 1968 to serve the Phoenix and Tucson metropolitan areas and in making the related contractual water allocations and financial commitments

required by the Colorado River Basin Project of 1968. (Rep. Tr., pp. 2689-95.) (Arizona's reliance upon the 1964 Decree is more fully set forth in its brief being filed separately.)

Despite protestations of uncertainty, the Special Master does grudgingly concede that the State Parties did rely upon the 1964 Decree as a basis of future planning. (Spec. Master's Rep., p. 46.)

The State Parties' reliance on the 1964 Decree was completely justified. As noted earlier, the central objective of the former Master was to fashion a decree which would resolve with certainty and finality the conflicting claims to water of the Colorado River. One such major claim which the former Master and the Court quantified with finality was the Tribes' reserved rights claim. Against this background, it is not surprising that the State Parties relied on those portions of the 1964 Decree which quantified the Tribes' rights. Those findings served as the cornerstone of the decision. Failure to rely on them would have shown a remarkable disregard for an exacting, specific and tailored mandate with which the parties were directed to comply.

2. Alternative Relief for the Tribes: the Court of Claims.

The drastic action of reopening the 1964 Decree plainly should not be taken if another remedy exists to remedy what the Special Master characterizes as the United States' "inadequacy of representation" in failing to dedicate "its efforts to maximizing the Tribes' welfare." (Spec. Master's Rep., pp. 49, 52, note 67.) Without agreeing with the Special Master's characterization, if such allegations could be proved, the State Parties believe that alternative relief is available to the Tribes that would keep them whole while not visiting the cost of any proved misfeasance by the United States as trustee solely on certain water users in the several states.

The essence of the omitted lands claim is that the United States, for whatever reason, in the prior proceeding did not make a claim for all lands capable of meeting the practicably irrigable standard and thus failed to adequately represent the Tribes' interests. The State Parties believe that the most appropriate procedure to test that theory would be a suit against the United States for monetary damages in the United States Court of Claims. In *Mitchell v. United States*, 445 U.S. 535, *reh. denied*, 446 U.S. 992 (1980), this Court ruled that 28 U.S.C. § 1505 confers jurisdiction on the Court of Claims to hear a suit by an Indian tribe against the United States whenever the tribe has a substantive right to sue, that is, whenever there has been a waiver of the United States' sovereign immunity as to the particular claim or claims involved.

In *Mitchell*, money damages were sought by individual Indians and by the tribe for alleged mismanagement by the United States of timber resources on certain allotted lands. The Court ruled that the General Allotment Act of 1887[24] does not impose a fiduciary duty on the United States to manage timber resources and therefore no actions could lie. It then stated (*id.* at 542):

> We need not consider whether, had Congress actually intended the General Allotment Act to impose upon the Government all fiduciary duties ordinarily placed by equity upon a trustee, the Act would constitute a waiver of sovereign immunity. We conclude that the Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources.

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[24]24 Stat. 388, as amended, 25 U.S.C. §§ 331 et seq.

On remand, the Court of Claims determined that other statutes under which the Indian claimants asserted damages did create a fiduciary duty on the part of the United States to manage forest lands. Upon proof of breach of these responsibilities, the Court ruled that the Indians would have a claim for money damages under 28 U.S.C. § 1505. *Mitchell v. United States*, 664 F.2d 265 (Ct. Cl. 1981).

The present case differs somewhat from *Mitchell*. Here, any tribal claim for damages would be based, *inter alia*, on the general fiduciary duty of the United States to represent Indian tribes in litigation. See 25 U.S.C. § 175 (1976); Spec. Master's Rep., p. 48. Unlike *Mitchell*, it is beyond question that such a general duty exists. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369-70 (1968); *Heckman v. United States, supra*. The motions of the United States which in part triggered this lawsuit are predicated upon such a duty. *Heckman* establishes that the United States' representation of the Tribes is complete and does not depend on the Tribes' acquiescence. Since the Tribes are bound by the United States' representation, it seems only fair that the United States, as trustee, should be held accountable for any breach of its fiduciary duty due to inadequate representation.

Monetary damages for the Tribes are an adquate remedy. Most of the lands have historically been farmed not by tribal members but by non-Indian lessees. (*E.g.*, Rep. Tr., pp. 1346-68, 1396, 1401, 1413-21.) Thus, the loss to the Tribes if the United States failed to adequately represent their interests in the prior proceeding, is solely monetary, i.e. lost revenue from leases. Under these circumstances, a Court of Claims recovery for monetary damages is completely sufficient and preferable to the drastic avenue of relief chosen by the Special Master, namely, destruction of the integrity of the 1964 Decree.

II.

THE SPECIAL MASTER, IN ACCEPTING AS CONCLUSIVE THE DISPUTED RESERVATION BOUNDARIES ESTABLISHED BY THE UNITED STATES AND PROCEEDING TO TRY THE ISSUE OF PRACTICABLY IRRIGABLE ACREAGE WITHIN ADDED LANDS FOR PURPOSES OF INCREASING THE WATER ALLOCATIONS OF THE RESERVATIONS, HAS ACTED CONTRARY TO THE COURT'S 1964 DECREE ALLOWING ADJUSTMENT OF WATER ALLOCATIONS ONLY WHEN THE DISPUTED BOUNDARIES HAVE BEEN FINALLY DETERMINED.

A. Introduction.

The motions of the United States and the five Indian Tribes for modification of the Court's 1964 Decree allocating water to the respective Indian reservations include claims of additional water entitlements based upon asserted restoration of Indian lands through "final" resolution of certain boundary disputes.[25]

Stated briefly, under the *Winters* Doctrine,[26] the claims of the Indian Tribes and the United States to additional water based upon additional reservation lands are dependent upon two factors: first, a determination that the land for which additional water is claimed is, in fact, within the reservation; and second, a determination that such added land is practicably irrigable (*Arizona v. California, supra*, 373 U.S. at 601). The Special Master by order of August 28, 1979, confirmed in his report of February 22, 1982, has precluded the State Parties from challenging the enlarged reservation boundaries advanced by the United States and the Tribes and has proceeded to hear evidence on practicably irrigable acreage within the added lands and to propose substantial

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[25]Motion of the United States for Modification of Decree and Supporting Memorandum, December 1978, pp. 8-17.

[26]*Winters v. United States*, 207 U.S. 564 (1908).

water allocations based upon findings of practicably irrigable acreage. He has accepted certain administrative orders of the Secretary of the Interior and court decrees of cases in which the State Parties were not represented, as constituting final determinations of disputed reservation boundaries.

In the following argument we will demonstrate that while this Court in its 1964 Decree in this case provided for the possibility of adjustment of the water allocations decreed for the Fort Mojave and Colorado River Indian Reservations "in the event that the boundaries of the respective reservations are finally determined" (*Arizona v. California*, 376 U.S. 340, 345 (1964)), it did not intend that the disputed boundaries issue could be resolved by unilateral action of only one of the sides of the water entitlement controversy.

B. Significance of the Disputed Reservation Boundaries Issue.

In order to fully appreciate the significance of the erroneous ruling of the Special Master in accepting as binding upon the State Parties, for purposes of revising the water allocations, the disputed boundaries advanced by the United States and the Tribes, it is necessary to consider the litigation context in which this question originated.

The instant case arose in 1952 essentially to apportion the waters of the Colorado River among the lower basin states of Arizona, California, and Nevada. The United States intervened to assert its various interests. With respect to claims of the United States, the issues included allocations of water to a number of Indian reservations including the five Tribes in the present proceedings based upon their *Winters* Doctrine rights, although that part of the case was secondary compared with the other issues. Nevertheless, the issues relating to water entitlements of the Indian res-

ervations were fully tried before Special Master Rifkind ("the Former Master"). These issues involved disputed boundaries of two reservations and the amount of practicably irrigable acreage on each of the reservations. *Arizona v. California*, 373 U.S. 546, 600-601 (1963). Following trial, the former Master made rulings in favor of the California position on the disputed boundaries, except for two instances involving avulsive changes of the river, and determined the practicably irrigable acreage within the determined reservations and allocated water accordingly. His determinations were incorporated in his report to the Court. (Former Master's Rep., December 1960, pp. 254-266.)

In these earlier proceedings, it was readily seen by all parties that rulings on water entitlements for the reservations necessarily involved boundary adjudications where the boundaries were in dispute, for the water entitlements are dependent in part upon the extent of the reservations.[27] Unfortunately, it was not realized until the proceedings before the Former Master were completed that private individuals not parties in the case had independent interests in the adjudication of reservation boundaries. For this reason, the California parties in their brief to the Court urged rejection of the Former Master's boundary determinations, or else addition of a disclaimer with respect to any boundary determination's effect on land titles.[28] The Court was essentially faced with the dilemma of a water rights adjudication that necessarily involved boundary adjudications but which lacked possibly affected parties. Rather than remand the

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[27]None of the parties questioned the authority or propriety of the Former Master trying the disputed boundaries. The order appointing Special Master Tuttle is no different that appointing the Former Master.

[28]*See* Opening Brief of the California Defendants in Support of Their Exceptions to the Report of the Special Master, May 22, 1961, pp. 279-282.

case for new proceedings, the Court rejected the boundary adjudications but adopted the former Master's water allocations based upon his boundary determinations.

> ". . . The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable.
>
> We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave [*sic*] Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time." *Arizona v. California, supra*, 373 U.S. at 601.

In short, we believe the Court made the best of an unfortunate situation but recognized by way of Article II(D)(5) of its Decree that the matter was not being fully laid to rest:

> ". . . the quantities fixed in this paragraph [Fort Mojave Indian Reservation] and paragraph (4) [Colorado River Indian Reservation] shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined: . . ." *Arizona v. California, supra*, 376 U.S. at 345.

The instant argument concerns the meaning to be given to the above statement of the Court and, particularly, the words "finally determined."

C. Interpretation of the Court's Intent in Providing for Adjustment of Reservation Water Allocations Under Article II(D)(5).

The Special Master has ruled that certain orders of the Secretary of the Interior and judgments in actions in which the State Parties were not represented, meet the Court's test of final determination of disputed reservation boundaries:

> "I conclude that the determinations that have been made with respect to the stated boundary changes may be accepted as final for the purpose of considering additional allocations of water rights to the Reservations." (Spec. Master's Rep., p. 63.)

In so ruling, the Special Master has grievously prejudiced the parties contesting the additional water claims for the Indian Reservations. As we have pointed out, the claims based on lands allegedly restored to the reservations depend on a two-step process. First, the United States must establish that the added lands are, in fact, part of the reservations; secondly, it must establish that such lands contain practicably irrigable acreage. The Special Master has relieved the United States from meeting the first requisite of these claims.

A number of considerations will show that the Special Master is in error in so interpreting the Court's 1964 Decree providing for adjustment of water allocations upon final determination of disputed reservation boundaries.

1. Orders of the Secretary of the Interior.

The Special Master adopted completely the position urged by the United States that various administrative actions of the Secretary of the Interior, and particularly the June 3, 1974 Order of the Secretary pertaining to the Fort Mojave Reservation, the January 17, 1969 Order of the Secretary pertaining to the Colorado River Reservation, and the December 20, 1978 Order of the Secretary pertaining to the Fort Yuma Reservation, are the "final determinations" of the disputed reservation boundaries intended by the Supreme Court in Article II(D)(5) of its 1964 Decree.[29] (Spec.

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[29]Although Article II(D)(5) of the 1964 Decree refers to the disputed boundaries of only two reservations, the State Parties have not objected to its application to the other reservations as well. Accordingly, the stipulated Decree of 1979 contains the proviso respecting possible adjustment of water allocations for all five reservations. *Arizona v. California*, 439 U.S. 419 (1979).

Master's Rep., pp. 57-63.) This conclusion cannot withstand analysis.

First, the Court was well aware that the boundaries of the Fort Mojave and Colorado River Indian Reservations were disputed and that when subjected to the truth-seeking procedures of trial, the essential position of the United States was defeated. While the Court did not consider the boundary adjudications appropriate in the water rights suit, it nevertheless adopted the Former Master's allocations of water for the reservations based upon his boundary determinations. Hardly, then, is it reasonable to infer that the Supreme Court's reference to "final determination" of the disputed boundaries merely contemplated unilateral pronouncements by only one of the adversary parties to the those disputes, the United States. Yet that is the interpretation placed on the Supreme Court's language by the current Special Master in his accepting Secretarial orders as binding determinations of disputed boundaries. We submit, it is totally unreasonable to conclude that the Court intended invaluable water rights to turn upon administrative actions of one party to a legal dispute, especially where that party, with two minor exceptions, had not succeeded after full trial of its position.

Moreover, if administrative action of the United States was all that was required to resolve the boundary disputes on the different reservations, did not the Court already have that, in substance, by way of the pleadings and position put forth by the United States in the original proceedings in 1956? To argue that what was lacking for "final determination" of each reservation boundary dispute was merely an appropriate order of the Secretary of the Interior is to accuse the Supreme Court of putting form over substance. Clearly, it was not administrative action of the Secretary that was intended by the Court when it provided for adjustment of water allocations should the disputed reservation

boundaries be "finally determined," but, rather, determinations of the adversary positions of the United States and the affected State Parties, by an impartial tribunal.

Nor should we overlook what has become the essentially transitory nature of the administrative actions that the United States would have us believe are the "final determinations" of reservation boundaries as intended by the Court to allow water allocation changes. The unilateral action taken by the Secretary of the Interior is almost shocking in the case of the December 20, 1978 Secretarial order relating to the Fort Yuma Reservation. In this case, three previous Department of the Interior Solicitor opinions over a forty-one year period (Margold-1936, Weinberg-1968, Austin-1977)[30] had found invalid the Indian claim to enlarged reservation boundaries. The last of the three was issued only after representatives of the State Parties and representatives of the Indians' position had been afforded opportunity to submit briefs and argue the matter before, then, Solicitor Austin. Shortly thereafter, Solicitor Krulitz summarily reversed Solicitor Austin's opinion, finding the Indian claim to be valid, and the Secretary of the Interior quickly made an Order to that effect. The Krulitz opinion (Sol. Ops. 861.D.3) was issued without any prior notice or opportunity to be heard by the State Parties. The Fort Yuma Secretarial order was issued the same day as the opinion, followed the next day by the filing in this case of the United States' motion to modify the water allocations. One wonders how any Secretarial order could ever be considered "final", even for administrative purposes within the Department, when the under-

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[30]The State Parties request that pursuant to Federal Rule of Evidence 201 that this Court take judicial notice of these opinions. Copies of the Margold and Weinberg opinions are being lodged with the Court. The Austin opinion is found at Solicitor's Opinions 84 I.D. 1.

lying Solicitors' opinions may vary in conclusion from one occupant of that office to the next.

Finally, it should be observed that this Court's recent order of January 9, 1979, granting a joint motion of the parties for entry of a supplemental decree determining miscellaneous present perfected rights in this case, after directing satisfaction of all rights of the five Indian reservations in time of shortage, states:

> ". . . provided that the quantities fixed in paragraphs (1) through (5) of Article II(D) of said [1964] Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court *in the event that the boundaries of the respective reservations are finally determined.*" *Arizona v. California, supra,* 439 U.S. at 421. (Emphasis added.)

There can be little doubt, in view of the language italicized above, that the parties in requesting entry of this order and the Court in making the order regarded the reservation boundary questions still unresolved. If the disputed boundaries had already been "finally determined," it would not make sense to so word the proviso. Yet the administrative actions and the judicial rulings relied upon by the United States and adopted by the Special Master as final determinations of the reservation boundary disputes occurred prior to entry of the above order, several years before, in most instances.[31]

In treating these orders of the Secretary of the Interior as final determinations of the disputed boundaries, thereby adding reservation lands which in turn became a basis for senior priority claims to additional water, the Special Master

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[31]The Secretarial order regarding Ft. Yuma was issued prior to entry of the Supplemental Decree although the matter of said Decree had been argued and submitted prior to issuance of that order.

is permitting the United States to accomplish what it could not achieve through trial — establishing the validity of the reservation boundaries it asserts.[32] The inequity to those whose water supply will be reduced, in denying them the opportunity to protect their interests, is all too plain. We should not ascribe such an intention to this Court in interpreting the 1964 Decree.

2. Federal Court Cases Involving Reservation Boundaries.

In addition to Secretarial orders, the United States relies upon and the Special Master has accepted certain federal court adjudications involving ownership or possession of land claimed to be part of an Indian reservation. (Motion of the United States for Modification of Decree and Supporting Memorandum, December 1978, pp. 17-23; Spec. Master's Rep., pp. 59, 61, 63.) Again, in accepting the position of the United States that the effect of these cases is to "finally determine" disputed reservation boundaries for purposes of water allocation adjustment, the Special Master is depriving the parties who will be affected by the water allocation adjustments of the opportunity to protect their interests. The State Parties did not claim title to any of the boundary lands in dispute in the original proceedings in 1956; yet in 1956 they were able to challenge the reservation boundary claims of the United States in order to protect their water entitlements. We agree with the United States and the Special Master that this is a water rights case, not a land title suit. We do not seek to challenge title determined in any of the cases relied upon by the United States. On the other hand, not having been parties to those

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[32]To allow the United States to unilaterally determine, without opportunity for judicial review, the very issue involved in the case was disapproved of in *United States v. State of Louisiana*, 229 F.Supp. 14 (Lafayette Division 1964).

actions, we should not be bound by those adjudications. And, particularly, we should not be bound by those boundary determinations insofar as they affect consequential water rights.

The Special Master correctly concludes that these quiet title actions are not ". . . res judicata of the boundaries as to litigants who were not parties to such proceedings." (Spec. Master's Rep., pp. 63-64.)[33] The logical conclusion of such a holding should be to allow such parties to litigate these issues in this case. The Special Master, however, accepts as final for purposes of additional water allocations these changes in the boundaries (Spec. Master's Rep., p. 63), thus circumventing the ruling which he has made as to the applicability of res judicata. Such a contradictory conclusion cannot be accepted by this Court.

Moreover, the interest of the individual defendants in the actions regarding ownership of property upon which the Master relies are so different from those of the State Parties that manifest injustice would result to the State Parties if reliance is placed upon these actions. As the Special Master states, this is a water rights case and not a land case. The interests of the State Parties are both direct and substantial and will derive, in part, from the status of the lands involved in this action. Thus, it is unreasonable and unfair to force these water right holders to rely on the litigation efforts of title claimants with regard to reduction of their irreplaceable water rights. Indeed, it would be unreasonable to force the State Parties to rely upon these actions, where many of the cases were not subject to searching judicial scrutiny, but

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[33]Such a holding is consistent with the principles that only parties and privies are bound by a prior judgment. (See, *Bruszewski v. United States*, 181 F.2d 419, 422 (3d Cir. 1950), *cert. denied* 340 U.S. 865 (1950).

were resolved by stipulated judgments.[34] In contrast to these stipulated judgments, it is noteworthy that in the adversary proceeding before the Former Master, the major boundary claims asserted by the United States were defeated. (Former Master's Rep., pp. 269-287.)

For the Special Master to accept these judgments as final within the context of this case is to circumvent the rules of res judicata and apply it here, contrary to the principles of justice, fairness, and the requirements of due process of law.

D. Reasoning of the Special Master in Support of His Ruling.

In rejecting the position of the State Parties, that evidence of the correct boundary lines and perhaps the claims of private individuals should be received so that a final determination of the correct boundaries could be made in this litigation, the Special Master assertedly relies on "The model of the previous treatment of the boundary determinations by the Court itself. . . ." (Spec. Master's Rep., p. 65.)

The Special Master misreads the Court's 1963 decision. It did not reject the action taken by Special Master Rifkind in hearing and deciding the disputed boundaries. As we have noted, such a resolution is a prerequisite to allocating water for a reservation — the land claimed must be part of the reservation or it cannot be allocated the water under the *Winters* Doctrine. Rather, the Court accepted his water allocations based on his resolution of the boundary disputes.

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[34]Stipulated judgments were entered in the following cases: *United States v. Denham*, 73-495-ALS (U.S. D.C., 1975); *United States v. Curtis*, 72-1624-DWW (U.S. D.C., 1977); *Cocopah Tribe of Indians v. Morton*, 70-573-PHX-WEC (1975); *United States v. Brigham Young University*, 73-358-DWW (U.S. D.C., 1976).

Arizona v. California, supra, 373 U.S. at 600. What the Court disapproved was the Former Master's recommendation findings and decision as to titles.[35] It is most likely that this was done, not as the current Special Master believes, because it is a water rights case, but because of the possibility that interested parties could be affected by a court determination of title who were not before the court.[36]

In the instant proceeding, the State Parties suggested that this problem could be eliminated by joining all parties who could be affected by a determination of title so as to obtain a truly final adjudication of water rights which all parties recognized are dependent on valid reservation boundaries.[37]

Although we readily acknowledge that the Special Master could decline to accept our proposal to join such land claim-

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[35]Ironically, it was the United States that then insisted that boundary determinations be binding adjudications for title as well as water allocation purposes:

"In the process of determining the irrigable acreage of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation and the consequent quantity of the water rights to be decreed for these Reservations, the Special Master had to resolve disputes between the United States and California concerning the proper location of the western boundary of each of these Reservations.

. . .

The determination of the boundary of each Reservation is an essential prerequisite to the determination of the quantum of the water rights for that Reservation. There is no question of the Court's jurisdiction to resolve boundary questions nor of the authority of California to act as *parens patriae* for its citizens in such matters. *Rhode Island v. Massachusetts,* 37 U.S. 657. We oppose the disclaimer proposed by California because of its possible derogative effect upon the water rights herein decreed by the United States." (Answering Brief of the United States, August 1961, pp. 94-95.)

The California parties' 1961 Opening Brief specifically urged the Court to refrain from adjudicating title, pointing out that individual land claimants who would be affected were not parties to the proceeding.

[36]Opening Brief of the California Defendants in Support of Their Exceptions to the Report of the Special Master, May 22, 1961, pp. 279-282.

[37]Memorandum of the Urban Agencies re the Indian Reservation Boundary Question, April 12, 1979, p. 2.

ants, we fail to understand his legal justification for dispensing with the determination, for purposes of deciding water right entitlements, of the boundary disputes raised by the State Parties as to various of the reservations. The model of the first case the Special Master relies upon illustrates the very opposite of what he has done. As we have noted, the boundary disputes were actually tried and the water allocations of the Court were based on the determinations resulting from that trial. *Arizona v. California, supra,* 373 U.S. at 600.

The Special Master observes that the Court's provision for adjustment of water rights in the event the boundary disputes are resolved indicates it would be adequate to resolve them elsewhere than in proceeding before the Court. (Spec. Master's Rep., p. 66.) We do not quarrel with that conclusion. Rather, it is our position that there is no indication that it would be less adequate to resolve them in this case if necessary parties were joined. But in any case, that resolution must precede any adjustment of reservation water rights, whether it be in other litigation or as part of the instant proceedings.

The Special Master would support his conclusion, that one whose water rights only are at stake cannot expect to have boundary disputes resolved as a necessary element in protecting his water rights, by focusing on yet another sentence of the 1963 decision. Thus at pages 65-66 of his report he notes that after the Court rejected the recommended boundary determinations, it stated: "Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area [Colorado River Indian Reservation, Fort Mojave Indian Reservation], then the dispute can be settled at that time." *Arizona v. California, supra,* 373 U.S. at 601. The Special Master concludes that this merely recognizes that a party claiming title to land who

has been refused water by the Secretary could institute the action to settle the dispute over the Secretary's action "not one seeking a collateral determination of title." (Spec. Master's Rep., p. 66.)

While we agree that the Secretary's refusal to deliver water could trigger a proceeding testing his action, which would encompass the boundary question on which his action turned, it does not follow such a situation is the only one in which Secretarial action may be contested. As the Special Master has pointed out, this is a water rights case. Since water allocation to Indian reservations turns in the first instance on whether the practicably irrigable land claimed is in fact part of the reservation, it follows that any adjustment of the 1964 Decree must rest on a showing that disputed boundaries have been resolved. But the Special Master here would relieve the United States and the Indian claimants of this burden and instead hold the Secretary's action to be conclusive on non-Indian water rights holders. Something is very much amiss in this conclusion, for it stands for the proposition that action by the Secretary adversely affecting Indian water rights may be challenged before this Court, but that action of the Secretary adversely affecting others may not similarly be challenged. We do not believe the sentence of the 1963 decision quoted above supports that result.

The Special Master would further justify his foreclosing the State Parties from challenging the Secretarial orders by characterizing the boundary disputes presented in the original proceeding as being merely conflicts within the Interior Department or ambiguities in boundary descriptions, all of which have been removed by the Secretarial orders. "The disputes presented to the prior Master and the Court no longer exist." (Spec. Master's Rep., p. 67.) This is simply not true. The basic errors and inconsistencies of the United

States regarding the boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation are no less blatant today than when Special Master Rifkind so determined after trial in the original case. In addition, there are presented in this case the enlarged boundaries of the Fort Yuma Reservation produced by the Secretary just one day before the United States moved to reopen this case, which new boundaries were rejected by several former Secretaries over some 41 years. Hardly can these substantial disputes[38] be attributed merely to "conflicting positions within the Interior Department or ambiguities in the description of boundaries." (Spec. Master's Rep., p. 67.)

Next, the Special Master urges that the Secretarial determinations, through surveys, of Indian reservation boundaries are conclusive in collateral proceedings and are appropriate for adoption in this litigation as a measure for determining additional irrigable acreage. (Spec. Master's Rep., pp. 68-72.) Thus, he cites legal authority for the function of the Secretary to determine or correct boundary lines in public lands (p. 68) and for his right to even resurvey and redetermine the boundaries (p. 70), and declares, "Because the issue of boundaries arises as a collateral matter in this lawsuit the boundaries drawn by the Interior Department should be accepted as conclusively showing that fact at this time." (pp. 71-72.)[39]

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[38]The nature of the very substantial disputes as to the three reservations' enlarged boundaries is discussed in greater detail in the separate brief of the California Agencies.

[39]The Special Master suggests that if the Bureau of Land Management ". . . prepared a survey which the court must regard as conclusive, a dissatisfied litigant might still appeal to the Secretary of the Interior as has happened in this case." (Spec. Master's Rep., p. 69.) Such reasoning ignores the letter dated January 3, 1979, from the Department of the Interior, Office of the Solicitor, informing The Metropolitan Water District of Southern California that the Department of the Interior considers the Secretarial Orders to be final for its purposes. The letter further states that there are no administrative procedures available to challenge Secretarial Orders and that review of such matters must take place in a judicial forum. A copy of said letter is attached hereto as Appendix B. The State Parties request that pursuant to Federal Rule of Evidence 201 that this Court take judicial notice hereof.

We believe the Special Master's proposition that the State Parties' challenge to the boundaries of the three reservations is an impermissible collateral attack on Secretarial actions is both unsound and inapplicable.

The State Parties, or course, have never contested the *administrative* authority of the Secretary to survey public lands and to delineate Indian reservation boundaries. It does not follow, however, that such delineation is conclusive in litigation with the United States where the issue is the validity of federal water rights which turn on the accuracy of such administrative action. None of the cases cited by the Special Master involve that issue.[40] Rather, those cases involved private parties' claims to land which derived, in part, from federal surveys. In contrast, allowing the United States by administrative fiat to conclusively resolve one crucial element of its own case offends all concepts of due process.

Moreover, the principle espoused by the Special Master, even if valid, could not apply to the Fort Yuma Indian Reservation inasmuch as that Secretarial Order purports not to correct an allegedly erroneous survey, but to declare null and void an agreement entered into by the United States and the Tribe and ratified by Congress. Clearly, the powers of the Secretary, whatever they may be, do not extend to the power to modify or invalidate what is in essence a treaty between the United States and the Quechan (Fort Yuma) Tribe.

But our disagreement with the Special Master's characterization of our position as a collateral attack on Secretarial Orders is far more fundamental. The Court's 1964 Decree

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[40]*Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 16, 17 (1935); *Stoneroad v. Stoneroad*, 158 U.S. 240, 250-252 (1895); *Russell v. Maxwell Land Grant Co.*, 158 U.S. 253 (1895); *Knight v. United States Land Association*, 142 U.S. 161, 176-178 (1891); *Cragin v. Powell*, 128 U.S. 691, 698-699 (1888).

does not relieve claimants of water rights under the *Winters* Doctrine from the burden of proving that reservation land is practicably irrigable. It merely declares that the boundary dispute may be resolved elsewhere. Similarly, that ruling does not provide for "resolution" of that issue by one party to the controversy — a concept foreign to Anglo-American jurisprudence. Thus, in order for the United States and the Tribes to take advantage of the water rights adjustment provision of Article II(D)(5) of the 1964 Decree, reiterated in the Supplemental Decree of 1979, there must first be a final adjudication or agreement involving the parties as to the issue of the location of the lands for which water is being claimed. The parties to this controversy now, as in the original case, include the State Parties and the United States. The Tribes are additional parties to the instant proceeding. The State Parties were not involved in any final adjudication of the boundary questions, nor have they agreed with the United States or the Tribes to settlement of that issue. For that reason, the United States and the Tribes are not in a position to avail themselves of Article II(D)(5). Their motions and petitions with respect to "boundary lands" are premature. Recognizing this, but wishing to have those issues resolved, the State Parties sought adjudication of the boundary questions before the Special Master. The Special Master, however, has simply relieved the claimants of proving an essential part of their cause of action and foreclosed the State Parties' showing that substantial acreage for which water rights are claimed is not so entitled because it is not within true reservation boundaries.

The Special Master would attempt to ameliorate this strange and unfair result by suggesting "inclusion in the final decree of the Court of a provision that would reduce the allotment now sought on behalf of the Tribes *pro tanto* for lands found to be practicably irrigable which subsequent

litigation determines not to be Indian land." (Spec. Master's Rep., pp. 74-75.) This is manifestly unjust, for the certainty of the State Parties' water supply is being affected by the proposed augmented award to the Tribes yet the State Parties would be dependent for relief on the supposition that some day someone claiming adverse title to the boundary lands may institute and succeed in litigation.

The Special Master suggests that the boundary issues raised by the State Parties are more properly raised in a direct proceeding under the Administrative Procedure Act. (Spec. Master's Rep., pp. 72-73.) But this possibility does not logically eliminate herein the issues presently raised as to the location of land for which a *Winters* Doctrine water right is sought. The burden is on a claimant to prove all elements of its case. It is no answer to say that such a primary element may be excused here and be the subject of litigation to be brought by the State Parties elsewhere.

Moreover, there is substantial uncertainty as to whether any such forum would be available to the State Parties. The Metropolitan Water District and the Coachella Valley Water District did in fact institute a suit in the United States District Court specifically to challenge the boundaries which the Special Master refused to hear in the instant proceeding.[41] The United States lost no time in moving to dismiss that action on various grounds, including that the plaintiffs had no standing, that the United States was immune from such

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[41]This action, *The Metropolitan Water District of Southern California and the Coachella Valley Water District v. The United States of America and James Watt, as Secretary, United States Department of the Interior* is on file in the United States District Court for the Southern District of California, Civ. No. 81-0678 GT(M).

The State Parties request that pursuant to Federal Rule of Evidence 201 that this Court take judicial notice of these pleadings. Copies of the Amended Complaint and the Motion of the United States and the Secretary of the Interior are being lodged with the Court.

action, and that the action as to the Fort Mojave and Colorado River Indian Reservations were barred by a six-year statute of limitations.[42] Thus, the United States makes clear its position that there is no forum to test the secretarial determinations of reservation boundaries.[43] The State Parties will simply have to accept the current determinations of the Secretary of the Interior, even though they are adversely affected and successfully challenged several of the same determinations before Special Master Rifkind. This uncertainty of having our day in court on this question is alone ample reason to reject the novel approach recommended by the present Special Master — granting water rights on the assumption the land in question is within Indian reservations subject to adjustment of such rights should there be a determination some day that the assumption is erroneous.

The Special Master would justify this anomaly by the remark "If the boundaries are not accorded finality for purposes of this litigation, the Tribes might be required to wait indefinitely, as one Secretarial Order has now stood un-

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[42]The court in that case has ordered that the case be stayed pending the Supreme Court's final ruling on the Special Master's Report in the present proceeding and on the additional basis that the case is not ripe for review because the plaintiffs complain of the impact of events which are yet uncertain.

[43]This action removes any uncertainty presented by United States' representative arguing before this court on October 10, 1978, on the Joint Motion for Entry of Proposed Supplemental Decree:

> "Mr. Justice White: 'Are those boundaries subject to attack in the district court now or not?'
>
> "Mr. Claiborne: 'A difficult question, Mr. Justice White . . . we would wonder who had standing to challenge them — that is, the boundaries. . . . The states — this is all public domain land, it is not state land — in principle have no standing. They may say that because it affects their water allocation, therefore they are a party aggrieved and therefore they have standing. That would be a matter for debate, as to which I do not want to make binding concession. But it is a close question.' (Transcript, pp. 61-62)."

challenged for over ten years." (Spec. Master's Rep., pp. 73-74.) This overlooks the possibility that the United States might have brought actions for declaratory relief to validate the Secretarial orders determining the disputed boundaries.[44]

But more important, there is no sound reason that such issues could not be tried in this proceeding, not to determine title if joining necessary parties is regarded as impractical or undesirable, but to determine water rights based upon the true reservation boundaries. Once again the Court would not be called upon to establish finality of title, but would award water rights based upon trial of the complete case of the claimants — location of disputed acreage as well as whether it is practicably irrigable. While this would add triable issues to what the Special Master contemplated, it certainly is more just than to award such rights adverse to the interests of the State Parties who may or may not have an opportunity to contest that vital issue.

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[44]Pursuant to 28 U.S.C.A. § 2201, the United States need only fulfill three prerequisites in order to bring an action for declaratory relief. It must show that the court has jurisdiction, that there is an actual case or controversy, and that the United States is an interested party.

Jurisdiction of actions commenced by the United States is provided by 28 U.S.C.A. § 1345. Moreover, that a case or controversy exists here cannot be doubted, for the history of the conflict between the parties, having once already litigated the boundary issues as to the Fort Mojave and Colorado River Indian Reservations in the original proceedings, makes it impossible to believe that this does not:

> ". . . show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." (*Maryland & Casualty Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270, 273 (1941).

Moreover, the United States is an "interested party" for no additional water allocation can be made until these reservation boundaries have been "finally determined."

Thus, the United States might have brought an action for declaratory relief.

Finally, we shall comment on a closing statement of the Special Master:

> "In sum, I agree with the position put forward by the United States that:
>
> > 'It would be wholly arbitrary to consider the Reservation boundaries as they were understood in 1964 to be sufficiently 'determined' to support a specific water allocation calculated on acreage — albeit no court judgment has ever vindicated the survey — but to deny comparable effect [*sic*] to subsequent dependent surveys of the boundaries because no court had approved them.' " (Spec. Master's Rep., p. 75.)

We believe this statement reflects another serious misunderstanding of the nature of the claimants' legal burden in this litigation. In essence, the Special Master is saying that since there was no adjudication of the boundaries as recognized in 1964 and they were, nevertheless, adequate to be utilized in the process of determining reservation water rights, the presently claimed boundaries, also unadjudicated, must be regarded equally satisfactory for that purpose. This overlooks completely the nature and consequences of contesting essential elements of a claimant's cause of action. Because certain boundaries claimed by the United States and the Tribes were challenged by the State Parties in the original proceedings in this case, a triable issue was created as to those boundaries. Water rights which are dependent upon those boundaries could not be determined until those boundaries were determined. Other reservation boundaries which were not challenged were not subject to this adjudicatory process because no issue for trial

was raised as to them.[45] This is the reason that the Court in its 1964 Decree required final determination of contested boundaries before a water allocation could be made for the involved acreage. It is not a question of equal dignity of all reservation boundaries drawn by the Secretary of the Interior, as the United States and the Special Master imply, but of fundamental pleading and trial practice.

Therefore, it is hardly "arbitrary," as the United States and the Special Master assert, to regard uncontested boundaries as a proper basis for supporting a specific water allocation but requiring contested boundaries to first undergo the normal scrutiny of trial before they can serve to support a water allocation. Indeed, it would be wholly unreasonable and contrary to fundamental legal precepts were it otherwise.

E. Conclusion.

What the boundaries issue comes down to is the rather self-serving argument of the United States, adopted by the Special Master, that although the *Winters* Doctrine makes clear that land entitled to a water right must be on the reservation, this essential element of the claimant's case need not be proven because this Court did not contemplate it being determined in these proceedings and the State Parties are barred from litigating that issue with the United States in a separate action. The answer to this, we submit, is that our system of justice insures a party his day in court. These are the proceedings most certain of jurisdiction and most

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[45]Perhaps this would have been more clear had the parties been required to file normal trial pleadings. Although this was requested by the State Parties at the pretrial conference, the Special Master refused to order such pleadings, but relied instead upon motions and petitions and responses filed with this court in connection with the reopening of this case. (Transcript, Atlanta, Georgia, July 1980, pp. 28-67.)

convenient for that boundary issues to be determined as a prerequisite element to any new water allocation for the reservations. Without so proceeding in this case, the motion of the United States and the petitions of the Tribes for modification of the 1964 Decree of this Court are premature and must be denied.

III.

THE SPECIAL MASTER ERRED IN HIS DETERMINATION OF THE AMOUNT OF PRACTICABLY IRRIGABLE ACREAGE WITHIN THE OMITTED AND BOUNDARY LANDS, WITH THE RESULTS THAT HE AWARDED THE INDIAN TRIBES WATER RIGHTS FAR IN EXCESS OF WHAT THE EVIDENCE SUPPORTS.

A. Introduction.

The central issue in the factual determinations made by the Special Master is how much of the acreage claimed for water rights by the United States and the five Indian Tribes is "practicably irrigable," pursuant to this Court's 1964 Decree in this matter. The Master has essentially equated "practicably irrigable" with economic feasibility (Spec. Master's Rep., pp. 89-98) such that acreage is "practicably irrigable" if projected annual benefits exceed projected annual costs (Spec. Master's Rep., pp. 99-100). Benefits are the gross revenues generated by growing certain crops or combination of crops on the land and selling them. They are calculated by multiplying annual crop *yields* by the *price* attainable in the market. Costs include both *production costs* of preparing the land and growing a crop and water costs to construct facilities and bring enough irrigation water to the land as is needed for particular crops to grow. A major element in water costs is the *power rate*, the cost of power needed to pump water from the source to the land to be farmed. The State Parties take exception to certain determinations of the Master relating to each of these elements

— yields and production costs as to the United States' claims, prices as to the Indian Tribes' claims, and power rates as to both.

In taking exception to certain factual determinations of the Special Master, the State Parties are well aware of the volume of evidence before this Court. So while we disagree with many of the Master's findings and know that the Court is not bound by those findings, we recognize that it is unlikely that the Court will wish to reweigh all the evidence where there are simply disputes of fact or expert opinion. We therefore limit ourselves to challenging only those factual determinations in which the Master has resolved conflicts in the evidence by applying an incorrect standard or by applying the correct standard in a discriminatory or otherwise incorrect manner. In other words, we are challenging factual determinations so tainted by errors in the premises upon which they were made that they should be rejected by this Court, which should in turn make its own, independent evaluation of the evidence.

In presenting these exceptions, we shall follow the organization used in the Special Master's Report, enumerating exceptions relating to the United States' claims and the Indian Tribes' claims, in that order. First, however, we will generally outline two basic categories of error that occur throughout the Report: 1) shifting of the burden of proof from the claimants to the State Parties and use of a double standard in assessing expert testimony; and 2) application of a theoretical, best case standard of practicable irrigability in disregard of the practical realities of placing and maintaining lands under irrigated agriculture.

1. Shifting the Burden of Proof — Double Standard.

The Special Master has often failed to apply the burden of proof to the United States and Tribal claimants and has instead erroneously shifted it onto the State Parties. A hint

of such error appears in the Master's characterization of the State Parties' statement that their dispute over United States' claims involves "land clearly subject to reasonable dispute." The Master gratuitously, and unnecessarily, states that this statement

> "almost constitutes an admission that a finding sustaining all the United States factual claims would not be erroneous even if the State Parties dispute these claims." (Spec. Master's Rep., pp. 125-26.)

Of course, the Master could just as easily have said the converse, that the statement supports a finding that *all* disputed United States claims *are* erroneous. But he did not, and the fact that he says what he does indicates a predisposition to view the claims as presumptively valid unless proven otherwise.

This predisposition to presume practicable irrigability is revealed subtly in the language by which the Master resolves certain disputes:

> "Thus, I am convinced that the gravelly character of this land should not result in a striking of the water rights claims . . . ." (Spec. Master's Rep., pp. 156.)
>
> "Under these circumstances, I should not find these lands to be non-practicably irrigable . . . ." (Spec. Master's Rep. p. 158.)
>
> ". . . . the gravelly land should not be excluded from being practicably irrigable" (Spec. Master's Rep. p. 160.)

Implicit in all these statements is the assumption that lands are practicably irrigable unless the Master finds a reason to *exclude* them; yet the burden of proof should be on the claimants to justify *inclusion* by a preponderance of the evidence.

Less subtle signs of the Master's predisposition are shown in his tendency to resolve his own confusion over the evi-

dence in favor of the claiming parties. In discussing the State Parties' projected increase in production costs for farming sandy lands, the Master states:

> ". . . . I simply cannot tell precisely to what extent the State Parties' 25% increase in costs is already accounted for in the United States' figures." (Spec. Master's Rep., p. 145.)

And yet the Master then totally disregards *any* cost increase projected by the States. In discussing whether the United States included in contingency costs for construction of irrigation systems an allowance for interest during construction, the Master states:

> ". . . . I am unable to discover which approach is theoretically correct or whether the United States in some manner accounted for this factor elsewhere in its calculations." (Spec. Master's Rep., p. 169.)

And yet, again, the Master adopts the United States' figures. On the subject of sprinkler pressure, the Master writes:

> "This state of the evidence leaves the factfinder in something of a dilemma . . . . neither side has directed my attention to any evidence showing the method for translating pressure at the pivot into pressure at the end of the arm." (Spec. Master's Rept., p. 178.)

And yet once again, the Master adopts the United States' numbers.

The Master rationalizes the above determinations on his generally greater confidence in the testimony of the United States' experts (Spec. Master's Rep., pp. 144-45, 169-170, 178-79.) It is certainly proper for the Master to decide that one side's experts are generally more convincing, but this cannot substitute for specific, explicatory evidence in the

resolution of particular points of factual confusion.[46] If the evidence is unclear and the burden of proof is on the claimants, the Master cannot remove that burden simply by saying that one side generally applies the better theoretical approach and therefore can be assumed to be correct in the particular instance even though confusion and conflict in the specific evidence is not susceptible of resolution. However much one may sympathize with the finder of fact in such a technical dilemma, one must conclude that in such case the party with the burden of proof has failed.

An interrelated error made by the Master is his application of a double standard in several significant areas, requiring unreasonably specific and quantifiable support for the opinions of the State Parties' experts while accepting and adopting broad, unsupported judgments made by experts for the claimants. In analyzing United States claims to sandy and gravelly/cobbly lands, the Master relies on the general "judgment" of the United States' economist as to crop yields (Spec. Master's Rep., p. 140) but rejects the judgment of the State Parties' experts as to production costs on the same lands, faulting the latter experts for lack of "itemized estimates" and for being "vague and unconvincing" (Spec. Master's Rep., p. 142). As we shall develop later, the Master is not only requiring more from the State Parties' experts, but is doing so regarding questionable lands for which even the United States' experts project only very small margins of revenue (in which crop yields are a key element) over costs. Therefore this application of a double

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[46]This illustrates that the Master on these occasions did not even apply the preponderance of the evidence test which he selected, much less a higher standard, such as clear and convincing evidence, which might well be appropriate in this case where the public interest is so great and the nature of the evidence so conjectural. *See Addington v. Texas*, 441 U.S. 418, 424 (1979.).

standard or shifting the burden of proof to the State Parties can cause prejudicial error and affect a major portion of the United States claims in dispute.

In analyzing power rates necessary to pump irrigation water to the various lands claimed as practicably irrigable, the State Parties criticized the United States for failing to show whether the cost of wheeling or transporting power from the source to the area of use was included in its proposed rate of 30 mills. (State Parties Post-Trial Open. Brief, p. 72.) Instead of requiring the United States to meet its burden of proof, the Master simply criticizes the State Parties' experts for the same omission and faults them for not directing "my attention to evidence demonstrating that the United States' expert erred in such particulars. . . ." (Spec. Master's Rep., pp. 173-74.) The Master then removes *all* burden of specificity from the claimant United States by saying:

> "Finally, the availability of a certain power rate at one location does not lose its generally useful value as proof simply because it is not demonstrated to exist at all relevant locations. The goal of the United States' study was to determine a general rate for the lower Colorado River area. The several sources considered by the United States were combined to form an estimate which seems a fair and accurate figure for general use on any of the five Reservations." (Spec. Master's Rep., p. 174.)

In other words, a general judgment, generally applicable will suffice if it comes from the United States' experts, and the State Parties can prove them wrong only by specific evidence. And, again, this double standard prejudiced the State Parties since higher power rates could easily increase water costs enough to make farming some claimed parcels noneconomic.

The Master does not hold the United States' experts to *any* standard of specificity as to costs on several Ft. Yuma Reservation parcels:

> "I find that with respect to these parcels the United States' engineering expert correctly stated that this issue is essentially a matter of judgment where a specific cost per acre cannot definitely be estimated." (Spec. Master's Rep., p. 189.)

As to parcel *CH-4* on the Chemehuevi Reservation where there was a dispute as to the effect of economies of scale on pumping costs, the Master faults the State Parties' expert for making

> ". . . no attempt to determine the economies of scale for the entire cost structure of serving this area." (Spec. Master's Rep., p. 191.)

The Master then states, as if by contrast:

> "The United States' expert, on the other hand, acknowledged that pumping costs would be greater for CH-4, but stated that the overall effect of economies of scale on other costs would offset the increase in pumping costs. I find that the State Parties' criticism is unwarranted and should not be considered in an analysis of practicable irrigability." (Spec. Master's Rep., p. 191.)

The United States' evidence is just as conclusionary and no more supported by detail than that of the State Parties, and yet the Master adopts the one and rejects the other. This is a double standard because the Master first requires support for the proposition that economies of scale would *not* have the offsetting effect alleged by the United States' expert, but then accepts the unsupported conclusion of that expert as to such effect.

Perhaps the most egregious and certainly most prejudicial example of the double standard is in the Master's analysis

of the Tribal claims regarding table grapes. His determination that grapes can be grown economically on the Indian Reservations is based primarily on the assumption of a very high price of $867 per ton, derived from the Arizona market in the period of 1977-79. The State Parties raised the issue of how the thousands of acres of increased grape plantings proposed on the claimed reservation lands would affect the Arizona market price, but the Master answers,

> "The State Parties' experts did no formal market studies to prove this point. . . ." (Spec. Master's Rep., p. 237.)

The import of this statement is that somehow all the claimants need to show is a historical basis for the assumed price but need pay no heed to the basic law of supply and demand and thus make no showing whatsoever that the price would be maintained irrespective of a large influx of new supply onto the market necessarily contemplated by their claims. Rather, the Master would place the burden on the State Parties to prove the opposite, namely, that the historic price would fall. The claimants need make no market study, only the State Parties. The double standard is employed and the burden of proof erroneously shifted. As we shall develop in greater detail later, the Master's finding as to grape price is grossly inflated, resulting in thousands of acres erroneously being declared practicably irrigable.

2. Conceptual Errors.

The second major category of error made by the Master is conceptual and has major prejudicial effect on his analysis of both United States and Tribal claims. That error is the application of a theoretical, best case standard of practicable irrigability in which he looks at each claimed acre as if it were in a vacuum and decides whether a profitable crop could be grown on that land by *any* farmer, and if the answer

is yes, that acre and all others like it are practicably irrigable. This approach has a superficial appeal, but it totally overlooks the practical realities of placing and maintaining lands under irrigated agriculture.

First, and most fundamentally, the Master cannot examine each claimed acre as if it alone were to be farmed. As an example, if the grapes are claimed for 10,000 acres, the Master cannot look at each acre, one by one, and then conclude that if *each* acre, considered individually, could show a profit, that therefore *all* 10,000 acres are practicably irrigable. This is known in economics as the fallacy of composition and is a fallacy because of its implicit assumption about price. One more acre of grapes would have no effect on the assumed market price, but 10,000 acres could well have a devastatingly negative effect, especially on a small, regional market such as the Arizona grape market. Therefore, the total number of acres projected for a particular crop must be considered in analyzing the economic feasibility of that crop. As we shall develop, *infra*, the Master's total failure to account for this factor has allowed him to award water rights, based on growing almonds and/or grapes, to thousands of acres in excess of the amount of acreage projected for those same crops by the Indian Tribes' own experts. (Spec. Master's Rep., p. 237.) The Indian Tribes have been awarded thousands of acre-feet of additional water on the glib assumption that if almonds and/or grapes will show a profit on any one acre of land, that they can be projected as profitable on as many acres of similar land as are available. This has not and cannot be substantiated.

Second, the Master cannot assume that *all* acreage claimed will be farmed by the *best* farmers, and yet that is exactly what he has done in analyzing yields with regard to the United States' claims. (Spec. Master's Rep., p. 141.)

This assumes the best case for *every* acre claimed and ignores the reality that land is farmed by average and poor as well as good farmers. Some acres will naturally get the high, best-farmer yields, but to base an award of water rights to *all* acreage based on such yields is to assume an average yield for all the acreage that would not occur in the real world. The inflated yields that result make large areas of sandy and gravelly/cobbly lands *appear* to be practicably irrigable which could not be farmed profitably by a cross-section of ordinary mortals.

A related error discussed earlier, *supra*, is the Master's assumption of a power rate. He clearly indicates that the assumed power rate need not be shown applicable on all the reservations and that a general figure can be used for all five reservations. (Spec. Master's Rep., p. 174.) He assumes a 30 mill power rate without even determining whether that figure does or does not include the cost of wheeling or transporting the power from the source to the land where it will actually be used to pump water. To excuse this omission on the grounds that a general rate is good enough is indefensible. The possibility that there is claimed acreage next to the source that can get power without wheeling costs is no basis for applying the economic analysis of that land to *all* the land claimed, and yet that is precisely the effect of the Master's ruling.

Although it has no significant, practical effect, another illustration of the Master's conceptual error is in his excluding *all* land classified as nonarable from irrigation parcels. Again, this is based on his error in looking at the land theoretically rather than in terms of how it will actually be farmed in the real world. The Master states his view precisely (Spec. Master's Rep., p. 163), but as noted before, it is wrong to look at the land acre by acre without regard to how the acreage as a whole would be farmed or what

prices would be obtained under real world conditions. This last error would appear to benefit the State Parites by excluding all nonarable land instead of just that amount unreasonably included in irrigation parcels. In fact, however, it has almost no effect since the amount of acreage excluded by the Master on this basis (1199 gross acres) (Spec. Master's Rep., p. 164) is nearly identical to that urged for exclusion by the State Parties (1192 gross acres). (SP Exh. 110, Tables B-1, B-3, B-4, B-5.) The explanation is that the State Parties would have allowed for some inclusion of nonarable acreage in irrigation unit configurations but would have also expected an offsetting number of arable acres inconveniently situated to be excluded. (SP Exh. 26, p. II-9.)

B. United States Claims.

1. Sandy and Gravelly/Cobbly Lands: Yields and Production Costs.

The State Parties disputed the practicable irrigability of some lands claimed by the United States on the ground that they were either too sandy or too gravelly/cobbly to be profitably farmed. (State Parties Post-Trial Open. Brief, pp. 11-54.) Economic analyses performed by the State Parties' experts confirmed that crop yields projected by the United States' economist for these lands were too high and production costs were too low, and that adjustment of either or both of these factors demonstrated that the lands were not practicably irrigable. In fact, the profit margins projected for most of these lands by the United States' economist were so narrow that even partial, minor downward adjustments in yield or upward adjustments in production costs would prove them noneconomic. (State Parties Post-Trial Open. Brief, pp. 25-37, 47-54.)

The Special Master has rejected the State Parties' analysis of yields and costs, but in so doing has made two fundamental errors discussed earlier: 1) he has assumed yields based on today's best farmers; and 2) he has applied a double standard, accepting general judgments of the United States' economist as to yields but rejecting similar judgments of the State Parties' experts as to production costs (Spec. Master's Rep., pp. 134-45, 159-60.)[47]

The United States' economist derived his yields for these poorer lands by taking his own yields for average (valley) lands and then reducing them. (Rep. Tr., pp. 905, 5997-98; U.S. Exh. 60, p. 2.) Since he based his valley land yields on today's *best* farmers (U.S. Exh. 60, pp. ii, 2, 9, 11-12), his base figure is unrealistically high (see *supra*); and yet the Master accepts this approach. (Spec. Master's Rep., p. 141.) The United States' economist then used the Palo Verde Soils Survey to develop a percentage reduction by which to reduce his valley land yields to sandy or gravelly land yields. (Rep. Tr., pp. 5997-98; Spec. Master's Rep., p. 140.) However, he never explained precisely how he derived that percentage reduction or what it is. Nevertheless, the Master does not require an explanation and simply accepts the economist's general conclusion, stating:

> "The ultimate figure adopted was quite properly a matter within his judgment, in which he considered such factors as yields actually achieved on sandy lands in the area." (Spec. Master's Rep., p. 140.)

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[47]There was no real dispute over the sandiness of the sandy lands, only as to its effect on farming and profitability. On gravelly/cobbly lands, the Master agreed with the United States that the lands were less gravelly/cobbly than claimed by the State Parties. (Spec. Master's Rep., pp. 147-48.) Nevertheless, no one has claimed these are average lands, and the United States' economist agreed that yields would be lower than on average lands. (Rep. Tr., pp. 782, 899-901; U.S. Exh. 60, pp. 10, 18.)

Thus, the Master accepts United States yields, which are based on excessively high average land yields and then reduced in an unspecified, quantified manner.

By contrast, when the State Parties' experts try to apply a 25% increase factor to costs of production on the same lands, the Master rejects *that* exercise of judgment:

> "The overall figure of 25% began as a representative number for all production costs based upon the experts' judgment without itemized estimates. When pressed to identify the magnitude of the increases attributable to individual items of production costs, the State Parties' expert was less than clear about the magnitude associated with any particular item among those listed above. Although this expert very confidently stated that he verified the overall figure by an item-by-item analysis, the vast majority of the cost items were never quantified in any reasonable form that would allow anyone to check his analysis." (Spec. Master's Rep., p. 142.)

Of course, one reason the State Parties' expert was "less than clear about the magnitude" of each item is the difficulty in quantifying increased costs for lands so sandy that there has been little past farming experience from which to draw. (Rep. Tr., pp. 3904-05.) Moreover, the statement that "the vast majority of items were never quantified" is misleading since the United States' crop budgets contained many cost items, and only a few would be affected, although significantly. The State Parties' expert listed these factors and estimated percentage changes for each, and then compared how production cost increases on sandy lands would be of a different nature than on gravelly/cobbly lands although the total percentage increase would be the same. (Rep. Tr., pp. 3706, 3721-22, 3878, 3896-3[illegible]4, 4342-43, 4408-09, 4411-15.)

It certainly may be said that the State Parties' expert did not do an item-by-item quantification of each production cost element attendant to farming sandy or gravelly/cobbly lands. Nevertheless, he was quite specific as to which items would change and in approximately what magnitude. This certainly presented the Master with as much, and probably more, to analyze than the United States' economist's yield adjustments based on a totally unquantified and unexplained percentage reduction in the Palo Verde Soils Survey yields. The Master's rejection of the former and acceptance of the latter constitutes the imposition of a double standard.

Moreover, the Master's decisions are summary. He *totally* accepts the United States' yields (Spec. Master's Rep., pp. 141, 159) even though only a very small decrease in those yields, considerably less of a decrease than the State Parties projected, would reduce projected revenues on several parcels of major size enough to make them uneconomic, simply because they are highly marginal even under the best case analysis of the United States' own expert. The Master also *totally* rejects *any* increase in production costs (Spec. Master's Rep., pp. 145, 159), much less the 25% proposed by the State Parties, over those projected by the United States' economist. And, as we noted, *supra*, he does this even after admitting that he cannot tell whether or not that 25% increase may already be included in the United States' estimates. (Spec. Master's Rep., p. 145.) Again, even small increases could tip the balance on major areas of lands against a finding of practicable irrigability. (State Parties Post-Trial Open. Brief, pp. 25-37, 47-54.)

What we have, therefore, are two errors that must be corrected. The valley land yields used by the United States' economist as a base must be reduced to reflect the reality of poor and average as well as good farmers. And then the same standard must be aplied to both sides' experts. If the

Court is to accept the United States' economist's judgment as to how he reduced yields, then it should also accept the State Parties' expert's judgment on increased production costs. And if lack of precise and thorough quantification is to render one judgment unacceptable, then both judgments must be rejected. The conclusion is that United States' yields must be reduced in either case to reflect average farmers and then yields must either be reduced further to reflect the poor lands or production costs increased. Either way, the small profit margins projected by the United States' economist on the major sandy and gravelly/cobbly parcels will be wiped out, as we have shown in argument before the Master. (State Parties Post-Trial Open. Brief, pp. 25-37, 47-54.) The United States' claims should therefore be appropriately reduced.

2. Water Cost Lands: Power Rates.

The State Parties disputed the practicable irrigability of some lands claimed by the United States on the ground that even though they could generate enough revenue to generate a surplus over production costs, this surplus would not cover water costs. (State Parties Post-Trial Open. Brief, pp. 58-59.) A major reason for this dispute was the United States' assumption of a 30 mill power rate for all lands, an assumption accepted by the Special Master in total disregard of any attempt to account for wheeling costs. (Spec. Master's Rep., pp. 173-74; see *supra*.)

The Master's error is prejudicial as to his findings of irrigability of major acreage on the Ft. Mojave Reservation. On units *FM-3* and *FM-5*, the United States' own projections show only a $19 per acre surplus of total revenue over total costs (149 to 130 - U.S. Exh. 60, p. 18) with a cost of $26 per acre allocated to power. (U.S. Exh. 42, Tables 7 and C-3.) On the *Calada Unit*, the United States shows only

a $9 per acre surplus (149 to 140 - U.S. Exh. 42, Table C-7; U.S. Exh. 60, p. 18) with a cost of $34 per acre for power. (U.S. Exh. 42, Table C-7.) Power costs vary directly with power rates, and thus an increase of as little as 33% (40 mills instead of 30 mills) would raise the power costs on the *Calada Unit* over $11 per acre and wipe out the surplus, thus making the unit nonirrigable. On *FM-3* and *FM-5*, a 75% increase (52.5 mills instead of 30 mills) would raise the power costs over $19 per acre and render these units also nonirrigable.

The 30 mill power rate is for power available from the Bureau of Indian Affairs (BIA) power company on the Colorado River Reservation. (Rep. Tr., pp. 587, 7057-58.) Both the United States' engineer and an expert for the Indian Tribes profess to believe that power will be available at approximately the same rate on the other reservations once wheeling (delivery) charges are figured in, although no contracts for such power presently exist. (Rep. Tr., pp. 587-590, 648-49, 7057-7060.) However, this belief hardly squares with the United States' engineer's own statement that wheeling charges *alone* for power on the Ft. Mojave Reservation may vary from 11.6 mills to 25 mills. How can power available at 30 mills from the BIA at one location be transported for a cost of anywhere from 11.6 to 25 mills and still cost only 30 mills? Whatever the correct power rates are, including wheeling charges, for each reservation, they simply cannot be the same at all locations without some showing of a power source *at each location* that charges as little as 30 mills.

If the Ft. Mojave wheeling charges were added to the 30 mill rate, the total costs would be anywhere from 41.6 mills (30 + 11.6) to 55 mills (30 + 25), surely making the *Calada Unit* nonirrigable even under the United States' projections and very possibly making units *FM-3* and *FM-5*

also nonirrigable. The record does not disclose whether or not this is an appropriate computation, though the resulting power rate range compares to the range used by the State Parties' expert of 36 to 53 mills, which was based on commercial power rates actually available in the various areas. (Rep. Tr., p. 3731.) The correct power rates would likely exclude from water rights major areas of the Ft. Mojave Reservation awarded rights by the Master. But since the United States did not meet its burden of proof on this issue, and since the Master simply ignored its import, there is no way to make a definitive finding. At the very least, however, the acreage must be excluded since the United States failed to meet its burden of proof.

The experts from the Ft. Mojave, Chemehuevi, and Colorado River Tribes used the same 30 mill power figure. (Rep. Tr., pp. 7057-60; FM Exh. 1, Table 11.) To the extent that figure erroneously fails to consider wheeling charges to the various locations of use, it must be revised. Moreover, a corrected calculation of almond and grape prices (see *infra*) will show most of these lands claimed by the Tribes to be not practicably irrigable in any case, even without an adjustment to reflect correct power rates.

C. Indian Tribes Claims.

1. Introduction.

The most singular fact about the Indian Tribes' claims is that the Special Master has found 15,403 net acres practicably irrigable (and has awarded 102,072 acre-feet of diversion rights) (Spec. Master's Rep., pp. 254, 266, 274, 277) not even claimed by the United States. For years, the United States has been criticized by these five lower Colorado River Indian Tribes for its alleged failure to represent them adequately at the original trial of this matter before Special Master Rifkind in the late 1950's. Faced with this

criticism, the United States initiated the current proceedings in late 1978 in order to assert additional water rights claims on behalf of the Tribes and was undoubtedly motivated to assert the maximum claims reasonably possible in order to justify its conduct as trustee. Under such circumstances, it is incredible to imagine that the United States and its experts could have been so unprincipled or so incompetent as to fail to assert the practicable irrigability of these 15,403 net acres recommended for water rights by the Master. And yet the Master's finding necessarily implies exactly that since it recognizes almost 50% more acreage as practicably irrigable than was claimed by the United States. (Spec. Master's Rep., pp. 196, 254, 266, 274, 277.)

This conclusion is even more astounding when one considers the extent to which the Master goes in praising the United States' experts' work in analyzing the United States' claims. This is particularly true regarding the United States' economist, whom the Master refers to as "the only professional economist to testify in this case" (Spec. Master's Rep., p. 174) and "the only true economist to testify" (Spec. Master's Rep., p. 141), and about whom, the Master says:

> "His lengthy and impressive experience as an agricultural economist active in economic analysis in the lower Colorado River region was simply unmatched by any other witness in this case." (Spec. Master's Rep., p. 135.)

In analyzing the United States' claims the Master agrees with the United States' economist on *every* disputed point in which he, among the three United States' experts, developed the United States' position. It is therefore most curious that the Master totally ignores the fact that this same economist participated in the formulation of United States' claims which did not include the *additional* 15,403 net acres

asserted by the Tribes and found practicably irrigable by the Master. It is even more curious that the Master *totally ignores* the fact that this economist, whom he praised so lavishly, specifically explained as a witness why he would not project such lands as being practicably irrigable. Not only was this evidence in the record, but the State Parties argued the point in their post-trial brief. (State Parties' Post-Trial Open. Brief, pp. 96-97.)

The simple fact is that none of the crops with any commercial history in the lower Colorado River Valley can be projected as economically feasible on these lands claimed by the Tribes. Only by projecting four, high revenue, permanent crops grown only in *other*, distant areas can the Tribes' experts attempt to justify a claim for these lands, and the Master has agreed as to two of these crops, almonds and table grapes. The United States' economist defines an exotic crop as one promising a large return in relation to the area but which has not normally been planted in the area and is unproven. (Rep. Tr., pp. 897-98.) Because such a crop may look promising at one time but may not work out in *actual* experience, as an agricultural economist he would tend to discount it. (Rep. Tr., p. 966.) He agrees with the State Parties' expert that it is generally accepted planning practice to use crops that are established in the area because they are proven. (Rep. Tr., pp. 769, 3737.) He has only projected crops grown in the area in his cropping patterns (for lands claimed by the United States) because he has experience or *firm* data on those crops. (Rep. Tr., pp. 730, 856.) He considers other crops to be speculative. (Rep. Tr., pp. 856-57.) This does not necessarily mean they cannot be economically grown, but lack of present crop history does raise serious questions about economic viability. (Rep. Tr., p. 769.)

The Master makes no attempt whatsoever to rationalize his implicit rejection of the United States' so highly regarded economist on this central issue. Moreover, he dismisses the State Parties' argument about the inappropriateness of basing water rights claims solely on unproven crops (State Parties' Post-Trial Open. Brief, pp. 77-80, 95-102) by stating:

> "Contrary to the State Parties' argument, I believe that I should not strike the possibility of successful production of permanent crops on the Reservations simply because of a lack of historical production of such crops in the area. In many regions new and untested crops have been introduced upon the advice of experts of the sort who counsel the parties in this case. The proper course, I believe, is to weigh the various opinions regarding the positive and negative factors with respect to each particular crop." (Spec. Master's Rep., p. 198.)

But no one denies that new and untested crops have been introduced on the advice of experts, or even that some have succeeded. The point is that a speculative decision on the part of a farmer to try something new should not be so elevated as to become the basis for assigning a water right, especially on an oversubscribed river where every new acre-foot given to Tribes will be taken away from needed municipal and industrial uses in the three Lower Basin states. It is simply inappropriate to base a permanent water right on wholly speculative data which might convince a daring farmer to invest in a crop which could do well, but which could also fail miserably, leaving no profitable alternative use of the land for agriculture.

We do not say that the Master's decision to analyze the positive and negative factors as to each crop was wrong *per se*. Faced with the inappropriate claims of the Tribes' ex-

perts, the State Parties' experts nevertheless did a suitability and economic analysis of each crop. But such an analysis must be coupled with the knowledge that *no* data is firm, that *all* data is speculative, and that great care must be taken in reaching any conclusion regarding profitability. This is where the Master has erred, and has done so in a most egregious and prejudicial manner. He has selectively ignored the testimony of the very witness whom he had previously found to be the most experienced and qualified agricultural economist in the lower Colorado region to have testified. Instead, he has done his own analysis, specifically in the crucial area of crop prices (see *infra*), that goes beyond even what the Tribes' own experts had projected, in what turns out to be the only way to justify a finding of practicable irrigability for the additional 15,403 net acres. By so doing, the Master has only underscored the conviction of the State Parties that they have not been dealt with in an evenhanded manner. The Master has not only allowed the Indian Tribes two shots at the State Parties by allowing them to be represented by *both* the United States *and* their own counsel, over objection; he has praised the United States' experts when to do so supported a determination of more water rights for the Tribes; he has then turned around and ignored the decision of those same experts to not assert additional claims and has instead not merely entertained those Tribal claims, but has largely substituted his own best case analysis of crop prices for that of the Tribes' own experts, with the result that vast additional lands are awarded water rights. In an apparent attempt to provide social justice to the Indian Tribes, the Master has done legal injustice to the State Parties.

2. Crop Prices.

With the exception of small areas on the Ft. Mojave and Ft. Yuma Reservations, almost all the 15,403 net acres claimed only by the Tribes and awarded water rights by the

Special Master were given such rights on the basis of permanent crops. Of the permanent crops projected for those areas by the Tribes' experts, the Master has found only two — almonds and table grapes — to be economically feasible. (Spec. Master's Rep., pp. 197-239.) The Ft. Mojave, Chemehuevi, and Colorado River Tribes have been awarded water for over 9,000 net acres (out of the 15,403) based on projecting both crops in their cropping patterns. (Spec. Master's Rep., pp. 266, 274, 277; FM Exh. 1, Table 9; CH Exh. 1, Table 8; CR Exh. 1, Table 8.) The Ft. Yuma (Quechan) Tribe has been awarded water for over 6,000 net acres (out of the 15,403) based on projecting only one of the two crops, table grapes. (Spec. Master's Rep., p. 254; FY Exh. 18, pp. 48, 52-53.) That so much water can be awarded on the basis of the speculative feasibility of only one, or at best two, crops commercially unproven in the area is even more amazing when one realizes that the Master's findings depend entirely on his own inappropriate calculations of respective crop prices. His entire analysis of the Indian Tribe claims comes down to prices, and he has committed highly prejudicial error in such determinations.

(a) *Almonds.*

The Special Master computed a payment capacity for almonds of $347 per acre per year, more than enough to cover water costs on all three reservations where almonds are projected. (Spec. Master's Rep., pp. 216-18.) In so doing, the Master correctly assumed the 2,000 lb. per acre yield projected by the State Parties and the nondisputed production costs proposed by the Tribes. He also used the State Parties' method of computing payment capacity. But he erred in assuming a price of 76 cents per lb. in shell. (Spec. Master's Rep., pp. 216-17, footnote 100.) This excessive price made the Chemehuevi and Colorado River

reservations appear economically feasible for almonds when, in fact, they are not if a correct price for almonds is assumed.

The Indian Tribes' experts originally assumed a price of 50 cents per lb. in shell, a figure accepted by the State Parties. (FM Exh. 1, Table C-1; CH Exh. 1, Table B-1; CR Exh. 1, Table B-1; SP Exh. 119.) Only during their rebuttal case did the Tribes' experts decide that the 50 cent price, which was based on a 5-year average of 1974-1978 prices, should be updated using 1979 and 1980 prices. (Rep. Tr., pp. 7093-99.) The Master has agreed that an update is necessary but has decided to use an average that includes "as the last price of the average the year in which costs are pegged." He has therefore used 1979 as the last year price. (Spec. Master's Rep., pp. 214-16.) The State Parties do not agree that the 50 cent price need be revised (State Parties Post-Trial Open. Brief, pp. 203-06; State Parties Post-Trial Closing Brief, pp. 27-29), but are not raising that issue in these exceptions. We do not take exception to the mere revision of price to include 1979; but we strenuously object to the *method* used by the Master to calculate a new price, namely, his use of a three-year average instead of a five-year average.

The longer, five-year average is generally preferred to the three-year average, the shorter average obviously more subject to being distorted by an unusually high or low price in a particular year. The State Parties' expert testified that he generally looks at price history over the past five to ten years, and if particular year prices appear out of line or off trend, he inquires as to the reason, as to whether there may have been a freeze or a rain that would account for the difference. If there has been a continual increase in price over the five-year period, he might take the last two or three years, depending on price fluctuation. In the end, he uses

his judgment to determine a price, attempting to arrive at a reasonable price, not necessarily just an arithmetic average. (Rep. Tr., pp. 4007-08, 4079-4083.) The Indian Tribes' own expert testified that the Bureau of Reclamation uses a five-year average, then drops out the two years farthest from the average and reaverages the remaining three years. (Rep. Tr., pp. 7132-33).[48] Speaking of his own work, the Tribes' expert states:

> "Well, I would, the standard — Normally you would use about five years for payment capacity calculations unless there was a trend of increasing cost or unless the cost had — I shouldn't use the word 'cost' there, I should use prices — unless the prices were exhibiting an increasing trend or had plateaued, made a jump, in which event you might be justified in using maybe the last three prices.
>
> "We, I think, would tend to use the five-year prices as a starting point, and then we would analyze whether or not there is evidence that would suggest a shorter period by looking at the price trends." (Rep. Tr., p. 7101.)

Looking at the almond prices relied upon by the Tribes' expert and by the Master, we see the following:

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[48]This method is quite different from the three-year average used by the Master even though the final average is based on only three years. Rather than averaging three consecutive years, the Bureau method averages the three years out of five that are closest to the five-year average. If the Bureau method is applied to the 1975-1979 prices relied upon by the Tribes' expert and the Master (see *infra* and CR Exh. 56), the result is a 52 cent price, very close to the original price assumed by the Tribes and accepted by the State Parties, but far less than the inflated price of 76 cents calculated by the Master.

Year	price per lb. in shell
1974	$ 0.45
1975	$ 0.37
1976	$ 0.41
1977	$ 0.53
1978	$ 0.89
1979	$ 0.85
1980	$ 0.83

(CR Exh., p. 56)

There was certainly an upward trend in prices from 1974 through 1978, the period used by the Tribes' expert in his original calculation of a 50 cent price. (Rep. Tr., p. 7096.) Yet this very same expert, who said that an upward trend or plateau "might" justify using only the last three year prices, nevertheless employed the "normal" five-year average. Moreover, even on rebuttal, this expert stood by his original projections without change (Rep. Tr., pp. 7147-49); and even though he presented graphs showing the effect of both three-year and five-year average prices on payment capacity (Rep. Tr., pp. 7095-97; CR Exh. 52), neither he nor any other expert at any time advocated the use of a three-year average instead of a five-year average for projecting a price for almonds.

This lack of support from *any* expert, even the Tribes' own, has not deferred the Special Master. He has looked at the 1975 through 1979 prices and has decided:

> "Because the almond prices have experienced a rapid rise in recent years, I find that a three-year average price should be adopted from the data for the years 1977-79" (Spec. Master's Rep., p. 216).[49]

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[49]It might be argued that the 1980 price could give rise to the conclusion of a price plateau and hence a three-year average; but the Master is not considering the 1980 price because he does not have actual 1980 costs. (Spec. Master's Rep., p. 216.) Therefore, the 1980 price should not be a factor. If it were, the State Parties could just as easily argue that the 1981 price of only 40 cents per lb. in shell should be considered as a counterbalance.

What the Master has done is to look at a group of almond prices and make his own judgment that the normal five-year average should be discarded in favor of the three-year average used only in special circumstances. The Tribes' own expert looked at a very similar group of almond prices (including 1974 instead of 1979), which also showed an upward trend, but still elected to use the normal, five-year average. In a case where the Tribes' experts can hardly be accused of restraint or conservatism generally, the Tribes' expert nevertheless used discretion in this instance. And while he subsequently advocated a revision of the price to include later years, he never advocated changing the *method* of calculating that price; he never advocated using the method employed by the Master instead of the normal five-year average.

That no expert advocated use of a three-year average is no mere accident. An exhibit presented by the State Parties' expert on surrebuttal (Rep. Tr., pp. 7189-94; SP Exh. 184) shows that gross revenues for almonds for the 1975 to 1979 period are far more in line with the gross revenue resulting from use of the State Parties' price (and original Tribes' price) of 50 cents than from use of either the 1975-79 five-year average price of 61 cents (calculated from CR Exh. 56) or the much higher 1977-79 three-year average price of 76 cents assumed by the Master:

(all figures are per acre per year)

	Price	Yield	gross revenue
1974-78			
5 yr. average	$ .50	2000 lbs.	$1000.00
1975-79			
5-yr. average	$ .61	2000 lbs.	$1220.00
1977-79			
3-yr. average	$ .76	2000 lbs.	$1520.00

year	gross revenue actually received
1975	$ 610.
1976	$ 708.
1977	$1036.
1978	$ 857.
1979	$2197.

(SP Exh. 184)

As is apparent, *actual* revenue received was at or below gross revenue projected by the State Parties in four of the five years. Even using the 1979 price in the five-year average, the 61 cent price gives a gross revenue considerably in excess of that *actually* received in every year but 1979; but using the three-year average of the Master results anywhere from 50% to 125% more gross revenue than was *actually* received in every year but 1979. The Indian Tribes' experts' discretion in not advocating a three-year average seems well supported, as does the State Parties' adoption of the 50 cent price.

The Special Master has made a very convoluted analysis in order to justify ignoring SP Exh. 184 insofar as it also relates to the table grape revenues. (Spec. Master's Rep., pp. 225-29.) However, he says absolutely nothing about its obvious relevance and probative value as to almonds. None of his reasons for ignoring it as to grapes have any applicability as to almonds, yet he never even mentions it.[50]

It is the opinion of the State Parties that the Master has selectively ignored the import of SP Exh. 184 as to almonds

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[50]Evidence at trial showed that there may be a slight *downward* distortion in per acre gross revenues for almonds in SP Exh. 184 due to inclusion of some acres with immature trees (Rep. Tr., pp. 7246-50, 7258); but there would also be a slight *upward* distortion in per acre gross revenue due to inclusion of revenue from acreage regarding as non-bearing. (Rep. Tr., p. 7258.) In any case, the Master discusses none of this or anything else relating to SP Exh. 184 as it applies to almond revenues.

and has arrogated to himself the exercise of expert economic judgment that none of the real experts in the case were willing to make. In our opinion, the Master has done this fully aware that by using a three-year average and a 76 cent price rather than a five-year average and a 61 cent price, he would be finding huge areas of land on the Chemehuevi and Colorado River Reservations to be practicably irrigable for almonds which would not otherwise be. By a letter of December 18, 1981 to the State Parties and Tribes (attached hereto as Appendix C), the Master performed a correct payment capacity calculation for almonds based on a 61 cent price, which is the exact 1975-79 five-year average price (CR Exh. 56) that should be applied assuming that the original 50 cent price need be revised. That calculation shows a payment capacity of only $150 per acre per year, far less than the grossly inflated $347 figure actually adopted by the Master based on his three-year, 76 cent average. At only $150 payment capacity, none of the Chemehuevi and Colorado River Reservation lands are practicably irrigable for almonds, since the water cost on the Chemehuevi Reservation is $171 (Spec. Master's Rep., pp. 276-77) and on the four Colorado River Reservation units ranges from $179 to $320. (Spec. Master's Rep., p. 273.) Needless to say, the same units all appear to be practicably irrigable based on the $347 payment capacity, as the Master found.

Thus, the Master has committed prejudicial error in his selection of a three-year average price for almonds; that instead of taking the utmost care in the highly speculative area of unproven crops, he has gone to lengths exceeding even those of the Tribes' own experts to select a method of price determination that happens to be the only way to make a finding as to the practicable irrigability of almonds on vast acreages of two reservations. We believe his findings must be rejected by the Court.

As a final matter on almond prices, we note that even were the Master correct on price, *arguendo*, his award of water rights on the Colorado River Reservation implies almost twice as much acreage in almonds as was projected by the Tribes' experts in their cropping patterns. The Tribes' experts claimed 8662 gross acres as practicably irrigable (Spec. Master's Rep., p. 267), of which one-half would be almonds and table grapes in a 1 to 2 ratio. (Spec. Master's Rep., p. 273; CR Exh. 1, Table 9.) The Master found 7801 gross acres practicably irrigable, but with almonds and grapes making up the entire cropping pattern, presumably in the same 1 to 2 ratio (Spec. Master's Rep., pp. 273-74). Instead of approximately 1400 acres in almonds, there would be about 2600 acres, nearly double. This may not be as major a problem as it is with grapes, because almond prices assumed by all parties come from the San Joaquin Valley market, which is a large enough market to absorb some increases in almond acreage without a major effect on price. However, the three Tribes projecting almonds did so for about 2200 gross acres of the additional lands claimed (State Parties Post-Trial Open. Brief, p. 207), a not insubstantial increase in almond plantings, and the 1200 additional acres anticipated by the Master (2600-1400) only compounds this problem (State Parties Post-Trial Open. Brief, pp. 210-11). At the very least, the Master should have considered the possible effect on price.

(b) *Grapes.*

The Special Master computed a payment capacity for table grapes of $535 per acre per year more than the $58 computed by the State Parties. The total payment capacity would be more than enough to cover water costs on all four reservations where grapes are projected. In so doing, the Master made the same assumptions as the State Parties'

experts, except that he applied a much higher price, $867 per ton instead of $680. (Spec. Master's Rep., pp. 238, 248.)

The assumption of such a price ($867) is totally indefensible since it is based on the small Arizona grape market which will be overwhelmed by the massive amount of new grape acreage proposed by the Tribes and awarded water rights by the Master. The State Parties' price ($680) is the appropriate price since it is based on the huge San Joaquin Balley market, and with it none of the reservation lands are economically feasible for grapes, assuming a yield of 4.4 tons (400 lugs) per acre. The Master has also assumed this yield in his calculations but has not actually decided that it is the correct figure. By footnote, he states his belief that the correct yield is at least 450 lugs per acre. Using that yield (450 lugs) (with an appropriate adjustment for increased harvesting costs due to higher yield) and the payment capacity analysis method relied upon by the Master (State Parties Exh. 121), the State Parties have calculated a payment capacity of $226 per acre per year based on the $680/ton price. (See Appendix D.) This amount is in excess of water costs assumed by the Master for the Ft. Mojave and Chemehuevi Reservations and for the smallest of four areas on the Colorado River Reservation; but it is not sufficient to meet water costs on the three large Colorado River Reservation parcels (*CH-103, CH-107, CH-108*) with water costs of $262, $227, and $320, respectively, totaling 7,626 gross acres (Spec. Master's Rep., pp. 273-74) nor is it sufficient to meet water costs of $344 for any of the 6,785 gross acres of "*Northern Lands*" found practicably irrigable on the Ft. Yuma Reservation. (Spec. Master's Rep., pp. 248, 253-54.) All of this acreage, and the water rights appurtenant thereto, should be stricken.

The Master's lengthy analysis of grapes is based on his reliance on a note from the files of the State Parties' experts indicating they were told by an extension agent in Arizona that a 3.85 ton (350 lug) grape yield had been sufficient to be profitable throughout the State of Arizona. Using this one scrap of unexplained information from a person who never testified, the Master concludes that the State Parties' analysis, showing grapes to be unprofitable with a *larger* yield of 4.4 tons (400 lugs), *must* necessarily be erroneous. The Master further concludes that the reason for this error must be an incorrect price. To buttress this last conclusion, he attacks a State Parties exhibit (State Parties Exh. 184) which purports to show that actual San Joaquin Valley grape revenues are in line with the State Parties' yields and prices. He also analyzes a State Parties' claim about the timing of the grape harvest on the reservations and concludes that the harvest will occur early enough to take advantage of the higher prices in the Arizona grape market. He therefore decides to assume a higher, Arizona price such that grapes appear economically feasible on all the reservations. (Spec. Master's Rep., pp. 221-239.)

We disagree with the Master's dismissal of State Parties Exhibit 184 and with his determination as to the timing of the grape harvest and availability of the Arizona market; but we need not take specific exception to these decisions because the Master's far more egregious error renders them relatively unimportant. The very reason that the Master attaches too much importance to the profitability of a 3.85 ton yield is the same reason why his use of an Arizona price is wrong. Certainly a small planting of grapes in the Colorado River area might be able to take advantage of the high prices in the Arizona market, and Arizona prices are so high that even a low yield of 3.85 tons might show a profit. But we are speaking of an Arizona grape market

based on only 3,200 acres of grapes (Rep. Tr., pp. 7192, 7243), and the four Tribes have made acreage claims based on cropping patterns that would put about 9,700 *additional* gross acres in grapes (see *infra*; see also State Parties Post-Trial Open. Brief, p. 207). This represents over a *three-fold* increase in the amount of grape acreage coming onto the Arizona market, and yet the Master still thinks he can assume a price based on that market consisting of only 3,200 acreas. And as we shall see, *infra*, the Master's award of water rights necessarily implies an even larger increase in grape acreage in disregard of the effect that would have on market price.

The State Parties' expert testified that he did not think an Arizona grape price was reliable in this case since you could not expect to get the historic Arizona price that is based on 3,200 acres of grapes if 4,000 new acres came onto the market. (Rep. Tr., pp. 7192, 7238-43.) In speaking of 4,000 new acres, he was not even including the more than 5,000 additional grape acres projected by the Ft. Yuma (Quechan) Tribe. The State Parties' expert relied on Kern County (San Joaquin Valley) data since it represents a much larger market and is thus more reliable. Kern County prices were substantially lower than Arizona prices, by as much as $200 per ton in 1977. (CR Exhs. 56, 61.) The 1977 Kern price for table grapes was $724 per ton while in 1978 the preliminary Kern price was $729. (Rep. Tr., pp. 7239-40.) Using the same .92 conversion factor for a marketing charge as employed by the Master (Spec. Master's Rep., p. 226), the resulting grape price is almost exactly the $680 assumed by the State Parties' experts. This $680 figure was the grape price originally assumed by the experts for the Ft. Mojave, Chemehuevi, and Colorado River Tribes (FM Exh. 1, Table C-6; CH Exh. 1, Table B-6; CR Exh. 1, Table B-6), and was adopted by the State Parties' experts because it seemed

a reasonable price.[51] Since it is the only price presented which approximates historic Kern County prices, it should be adopted.

The Master's rationalization for using an Arizona price in face of the State Parties' argument is weak at best:

> "This consideration does not persuade me to discard the Arizona price. The evidence shows that the grapes for these lands will compete with the Arizona *and* Coachella harvests, as well as with San Joaquin in the later stages of harvest. The Arizona price is the most relevant price to consider in this analysis. In addition, the inclusion of the Coachella production increases the size of the existing market beyond that which the State Parties consider. This argument fails first because it lacks any support other than a casual observation. The State Parties' experts did no formal market studies to prove this point and even if they had, I am not certain they were sufficiently qualified to do so. Moreover, I do not feel that this market inquiry is appropriate in the present context. The Tribes may not plant such extensive vineyards as their claims indicate; they might turn to other crops as their experience grows. The limit of the scope of fact-finding in this case must occur at some point, and I draw that line at this issue." (Spec. Master's Rep., p. 237.)

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[51]As confirmed during rebuttal, the $680 price assumed by these Tribes was calculated from an eight-year (1971-78) average of Arizona grape prices, not from any San Joaquin Valley prices. (CR Exh. 56.) Nevertheless, this does not change the conclusion of the State Parties' experts that Kern County (San Joaquin) prices are the appropriate ones to use or the conclusion that $680 accurately reflects Kern County prices, as shown in CR Exhibit 61. Furthermore, the Master's statement that the State Parties' experts believed Arizona prices to be relevant because they were listed on notes from the experts' file is a meaningless observation. (Spec. Master's Rep., p. 236; FY Exh. 44.) Just because our experts thoroughly investigated Arizona prices hardly implies that they ever considered them to be correct or appropriate for this case.

First, the Coachella harvest and market is irrelevant because there is no evidence as to Coachella prices, and the Master has assumed an Arizona price. There is nothing in the record to establish any identity or interchangeability of these two markets and prices. On the contrary, the same Tribes' expert who based the original grape price on the 1971-78 Arizona average (Rep. Tr., pp. 7100-01; CR Exh. 56) testified that he expects a grape harvest on the reservations to occur at the same time as Coachella and before San Joaquin so that a higher market price might be achieved, but that

> ". . . we really didn't take that prior consideration into our calculations." (Rep. Tr., pp. 1069-70.)

So he used Arizona prices but not Coachella prices; therefore they cannot be identical nor the two markets considered as one. It is thus incorrect for the Master to assume that the larger Coachella market could cushion the shock of all the new grape acreage coming into the Arizona market. If an Arizona price is assumed, the Arizona market alone must be considered.

Second, as we discussed *supra*, the Master transfers the burden to the State Parties to prove that Arizona prices would be affected. The most elementary consideration of the law of supply and demand should have raised such serious questions as to the validity of assuming historic Arizona prices as to force the Master to utterly discard these prices absent a strong showing by the claimants as to why he should not. Instead, he ignores the obvious and then actually tries to blame the State Parties for not providing him enough evidence by way of a formal market study. It is the Tribes who claim the land and who propose the Arizona prices upon which the Master bases his $867 finding; it is they who plan to triple the grape acreage coming onto the Arizona market; and it is they who should have

made the market study or whatever else was needed to show how their glut of new grapes would not affect the prices they assume. In relieving the claimant Tribes of *all* burden of proof, the Master has made a mockery of even his own preponderance of the evidence standard.

The Master's final statements only further weaken his position. To say that a market inquiry is not even appropriate because the Tribes may not plant so many grapes and may instead turn to other crops is either totally irrelevant or an admission that grapes cannot project as economically feasible for any, or as much, of the acreage for which they are projected. To award water now, there must be a crop which can now project as economic for each and every acre. That you may fill in later with some other crop that is not now projected as economic cannot be considered as a proper basis for an award of a water right.

Finally, the Master's statement that he is cutting off fact finding at this point is a most damning admission. A thorough inquiry into the effect of large new acreage on market price is absolutely essential if the small Arizona market price is to be assumed. The assumption of this price is determinative of the whole issue of the economic feasibility of table grapes on thousands of acres for which water rights are claimed. Without this assumption of price, none of the Ft. Yuma "Northern Lands" would be practicably irrigable, even assuming a 450 lug yield favored by the Master; without this assumption, almost none of the tribally claimed land on the Colorado River Reservation would be practicably irrigable. The decision of the Master to cut off fact finding at the very point at which the majority of the Indian Tribes' claims should be thrown out for utter failure of the Tribes to meet their burden of proof has raised in the State Parties the profound conviction that they have not been dealt with fairly.

Even were it somehow appropriate to use Arizona prices, *arguendo*, the Master has made a further error in that he has gone beyond the cropping patterns projected by the Tribes' experts.[52] As discussed *supra*, this results from the Master's looking at each claimed acre in a vacuum, assessing its asserted irrigability without regard to the reality that thousands of other similar acres would be farmed in the same crop. Not only does he choose a grape price without regard to the effect of new acreage on the market, he assumes that *any* amount of new acreage can come onto that market. He does not adhere to the amount of acreage necessarily projected by the Tribes' experts by virtue of their acreage claims and their cropping patterns. When there are too many acres and too few feasible crops, he simply assumes that a crop feasible for one acre can be projected to cover *all* acres and qualify *all* for water rights.

With regard to the Colorado River Reservation, the Tribes' experts projected grapes and almonds as only half the cropping pattern for 8,662 gross acres. (Spec. Master's Rep., pp. 267, 273.) The Master has found that these are the only two feasible crops, but has recognized 7,801 gross acres for water rights. (Spec. Master's Rep., pp. 273-74.) With grapes projected for twice as many acres as almonds, this means that instead of having grapes on one-third the acres claimed by the Tribes, or 2,887 gross acres, they must now be assumed for two-thirds the acres recognized by the Master, or 5,200 gross acres. On the Ft. Yuma Reservation,

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[52]The Master has also erred in again taking a three-year average price instead of the usual five-year average, and in this case the Tribes' own expert has used an *eight*-year average in his original calculation. (Spec. Master's Rep., p. 236; CR Exh. 56.) The three-year average (1977-79) as adjusted for marketing charge shows the $867 price assumed by the Master. The five-year (1975-79) average as adjusted is only $762 per ton. (CR Exh. 56.) However, assuming a 450 lug crop yield, grapes would still project as profitable, so this error is not prejudicial.

the Tribes' experts projected no cropping pattern, but did claim only grapes and pistachios. (FY Exh. 18, pp. 52-53.) Assuming half the cropping pattern for each, you get grapes on one-half of the 10,755 gross acres of "Northern Lands" claimed by the Tribes, or 5,378 gross acres. (Spec. Master's Rep., p. 249.) Since the Master has thrown out pistachios, but recognized 6,785 gross acres (Spec. Master's Rep., p. 254), the entire amount must be assumed to be grapes. Thus on the Colorado River Reservation, you have 2,300 additional acres (5,200-2,887) and on Ft. Yuma 1,400 (6,785-5,378), or 3,700 additional gross acres total in grapes over what the Tribes' experts contemplated.

Speaking of this problem as to the Colorado River Reservation, the Master says:

> "The Tribes anticipated this possibility and argued in their brief that they would concentrate plantings in crops found to be economically viable. For present purposes, I believe that response is sufficient. The State Parties responded to a similar argument by the Quechan Tribe by arguing that large plantings of any one crop would ruin the market for the crop. As I indicated earlier, no evidence of any study reaching this conclusion was presented even if the issue is relevant to present proceedings. The lands may be proved to be practicably irrigable on the basis of their ability to support any crop, but the Tribes might ultimately cultivate on these lands a variety of crops or none at all. Therefore, I must now consider the number of acres which may be found to be practicably irrigable on this basis." (Spec. Master's Rep., pp. 273-74.)

Apart from his repeated error of shifting the burden to the State Parties, the Master simply accepts the unsupported statement that the Tribes would concentrate on the economically viable crops. We believe this is no answer at all, because it does not take any account of the market. Just as

he erred in using the Arizona prices in the first place, the Master compounds that error by assuming that a limitless supply of grapes could enter that market without affecting prices. Even if his Arizona price were correct, *arguendo*, his findings of practicable irrigability in grapes for acreage in excess of that projected for grapes by the Tribes' experts should be stricken.

In conclusion, neither grapes nor almonds can be projected as practicably irrigable on units *CH-103*, *CH-107*, *CH-108* on the Colorado River Reservation nor on the *Northern Lands* unit on the Ft. Yuma Reservation. Therefore, all water rights awarded for these lands should be stricken.

D. Conclusion.

Even assuming that the Court awards permanent water rights to the omitted lands and/or to lands whose boundaries have not yet been finally determined, the amounts of practicable irrigable acreage and derivative water rights determined by the Special Master (Spec. Master's Rep., pp. 116, 121) must be corrected because of the Master's prejudicial errors regarding crop yields, production costs, power rates, and almond and grape prices. As shown in the following table (Table 1), such downward adjustments are as follows:

Reservation	Net Irrigable Acreage	Total Acre-Feet to be Excluded
Ft. Mojave	2,054	13,269
Chemehuevi	919	5,486
Colorado River	7,245	48,324
Cocopah	8	51
Ft. Yuma	6,623	44,175

TABLE 1

ACREAGE and WATER RIGHTS TO BE EXCLUDED TO CORRECT SPECIAL MASTER'S ERRONEOUS DETERMINATIONS AS TO THE AMOUNT OF "PRACTICABLY IRRIGABLE ACREAGE"

					Reason for Exclusion							
Reservation	Unit	State	Type	Claimant	Yields/ Costs on Sandy or Gravelly Lands[A]	Power Rates[B]	Almond/ Grape Prices[C]	Total Gross Acres	Net Factor[G]	Total Net Acreage	Diversion Duty[H]	Total Acre-Ft. to be Excluded
Ft. Mojave	FM-2	Arizona	omitted	US	370[D]			370	.95	352		
	FM-3	Nevada	omitted	US		120[E]		120	.95	114		
	FM-5	Arizona	omitted	US	358[E]	106[E,F]		464	.95	441		
	FM-7	Arizona	omitted	US	469[E]			469	.95	446		
	FM-11	Arizona	boundary	US	24			24	.95	22		
	Calada	Arizona	omitted	US	484[E]	231[E,F]		715	.95	679		
	FORT MOJAVE TOTAL				1705	457		2162		2054	6.46	13,269
Chemehuevi	CH-3	California	omitted	US	31[E]			31	.95	29		
	CH-4	California	omitted	US	937[E]			937	.95	890		
	CHEMEHUEVI TOTAL				968			968		919	5.97	5,486
Colorado River	CR-103	Arizona	omitted	Tribe			3585	3585	.95	3406		
	CR-107	Arizona	omitted	Tribe			3124	3124	.95	2968		
	CR-108	Arizona	omitted	Tribe			917	917	.95	871		
	COLORADO RIVER TOTAL						7626	7626		7245	6.67	48,324
Cocopah	EC-1	Arizona	omitted	US	9[E]			9	.95	8		
	COCOPAH TOTAL				9			9		8	6.37	51
Ft. Yuma	FY-2	California	boundary	US	75			75	.95	71		
	FY-7	California	boundary	US	16			16	.95	15		
		California	omitted	US	4[E]			4	.95	4		
	FY-8	Arizona	boundary	US	438			438	.95	416		
		California	boundary	US	11			11	.95	10		
	Northern Lands	California	boundary	Tribe			6785	6785	.90	6107		
	FT. YUMA TOTAL				544		6785	7329		6623	6.67	44,175

[A]Based on economic analysis of United States' experts (cropping patterns, prices, yields, production costs, water costs), as adjusted only to eliminate double standard used by Special Master so as to reflect either 1) State Parties yields or 2) State Parties Increased Production Costs.

[B]Based on United States' experts projected revenues and costs, as adjusted only to reflect inclusion of potential wheeling costs in power rates.

[C]Based on crop yields, production costs, and water costs as determined by the Special Master, and adjusted only for price.

[D]Figure does not include acreage on unit *FM-2* already excluded by the Special Master as part of the 1075 gross acres with indefinite boundaries. That portion of *FM-2* (118 gross acres) would also be excludable under the "yields/costs sandy lands" category. Similarly, unit *FM-6* is not listed herein because all 200 gross acres of its sandy portion were already excluded for indefinite boundaries but could also be excluded under this category. (Spec. Master's Rep., pp. 84-85, 193.)

[E]Figures do not include amount of acreage already excluded by Special Master as non-arable. (Spec. Master's Rep., pp. 161-64.)

[F]There are an additional 358 acres excluded in *FM-5* and 484 acres excluded on *Calada* for "yields/costs gravelly lands" that could also be excluded for power rates.

[G]As determined by the Special Master. (Spec. Master's Rep., pp. 100-03.)

[H]As determined by the Special Master (Spec. Master's Rep., pp. 91-92.)

IV.

THE SPECIAL MASTER ERRED IN GRANTING UNCONDITIONAL INTERVENTION TO THE INDIAN TRIBES.

A. Introduction.

The Special Master granted the Tribes leave to intervene unconditionally in this proceeding while allowing the United States continued participation in its capacity as trustee for the Tribes. In so doing, the Special Master fails to recognize the right of the three States to withhold consent under the Eleventh Amendment to suit by the Tribes.

Arizona, California and Nevada have the right to withhold consent to suit through intervention by the Tribes in these proceedings. Arizona has not consented while California and Nevada gave conditional consent predicated on representation of the Tribes' interests by the Tribe itself to the exclusion of the United States. This condition has not been met since dual representation has been permitted by the Special Master and, therefore, California and Nevada have not consented to suit by the Tribes.

Lacking consent by the three States to suit, the Tribes are barred from participating in these proceedings by the doctrine of sovereign immunity and the Eleventh Amendment. The concept of ancillary jurisdiction relied on by the Special Master fails to provide a separate and distinct basis for this Court to permit intervention by the Tribes in contravention of the sovereign immunity of a State and the mandate of the Eleventh Amendment. The Special Master's alternative reliance on 28 U.S.C. § 1362 as a jurisdictional basis for the Tribes' intervention in this proceeding is also misplaced. Congress never intended to abrogate the sovereign immunity of the three States to allow dual representation of the Tribes' interests.

Without a separate jurisdictional basis for allowing intervention of the Tribes, Rule 24 of the Federal Rules of Civil Procedure is inapplicable. The Federal Rules do not expand the jurisdiction of federal courts. Assuming Rule 24 is applicable, the conditions for mandatory intervention under Rule 24(a) have not been satisfied. There has been no showing that the United States cannot adequately represent the Tribes' interest in these proceedings.

A previous motion to intervene in the original proceedings was filed by the Navajo Tribe on grounds similar to the arguments advanced by the Tribes. This Court rejected those arguments. Moreover, the United States itself has conceded that intervention of the Tribes in this lawsuit may be barred by the sovereign immunity of the States. (Memorandum of United States in Opposition to Intervention, February, 1978, at p. 12; see also Response of United States to Motion for Leave to File Representation, July, 1956.)

B. Applicability of the Eleventh Amendment.

1. Intervention by the Five Tribes Constitutes Suit Against the Three States.

Previous pleadings filed in this case by the three States advanced the argument that, as States, Arizona, California and Nevada are immune from suit in federal courts without their consent by any or all of the five Indian Tribes irrespective of whether each Tribe is deemed a citizen of any one state, several states, or no state.[53] Granting intervention to the five Tribes constitutes suit against the States without their consent in violation of the Eleventh Amendment sovereign immunity notwithstanding the fact that claims of the

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[53]*See* Motion of the States of Arizona, California and Nevada and the Other California Defendants for Leave to File Exceptions to the Memorandum and Report of Special Master Elbert P. Tuttle, dated November, 1979.

five Tribes to Colorado River water are already before this Court through the United States as trustee.

Whether or not a suit is one against a state is not to be determined by formalities of the law of parties but by the actual effect of a judgment in favor of the applicants would have against a state. "(T)he nature of a suit as one against a state is to be determined by the essential nature and effect of the proceeding. *Ex Parte Ayers*, 123 U.S. 443, 490-99; *Ex Parte New York*, 256 U.S. 490, 500; *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 296-98." (*Ford Motor Co. v. Treasury Department*, 232 U.S. 459, 464 (1945)); *see also, Confederated Tribes of the Colville Indian Reservation v. State of Washington*, 446 F.Supp. 1339, 1349 (E.D.C. Wash. 1978).

The five Tribes claim additional present perfected rights above those quantified in the 1964 Decree in this matter. In so doing, the Tribes seek a judgment that is contrary to the interests of all three States. There are claims for additional rights to Colorado River water in each State. Any claim for use of water in one State is adverse to the interests of the other two States since in time of shortage, these claims would have a higher priority to be satisfied irrespective of state lines or the overall apportionment of the Colorado River among the three States. (*Arizona v. California*, 376 U.S. 340 (1964), Article II(B)(3).)

The relief sought by the five Tribes is not merely in the nature of an injunction prospectively directing the Secretary of the Interior to allocate Colorado River water in a different manner than previously decreed by this Court. The actual effect of these claims is to directly impact existing water right priorities by moving rights in each State downward and interposing new rights in the other States which would be satisfied first in times of shortage. The essential nature and effect of intervention, therefore, seeks to take away

existing water right priorities in which each State has an interest *parens patriae*. By seeking to establish additional claims adverse to each of the three States, the intervention permitted by the Special Master constitutes suits against the States by the five Tribes.

2. Ancillary Jurisdiction Does Not Provide a Jurisdictional Basis Overcoming the Sovereign Immunity of the State.

The Special Master holds that the States' sovereign immunity is not implicated by the Tribes' motions to intervene since "the intervenors' claims are ancillary to a case or controversy already within the Supreme Court's jurisdiction, they are within the scope of the States' constitutional surrender of immunity." (Spec. Master's Rep., p. 27; *see also* Spec. Master's Memorandum and Report on Preliminary Issues, August 28, 1979, pp. 16-24.) The States disagree with this conclusion.

The Special Master reasons that this Court provides the only forum for assertion of claims of the five Tribes to additional Colorado River rights. However, he then erroneously concludes that the Tribes themselves are entitled to intervene as parties to assert these claims disregarding the fact that the United States, as trustee for the Tribes, is a party and "[T]here can be no more complete representation . . ." *Heckman v. United States*, 224 U.S. 413 at 444 (1912).

Ancillary jurisdiction applies to claims and is not concerned per se with what parties assert those claims. *See Owen Equipment and Erection Company v. Kroger*, 437 U.S. 365, 372-373 (1978); *Aldinger v. Howard*, 427 U.S. 1, 16-17 (1976). In this case, ancillary jurisdiction does not provide an independent jurisdictional basis permitting intervention by the Tribes.[54]

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[54]*But cf. Oklahoma v. Texas*, 258 U.S. 574, 581 (1922) (private land owners allowed to intervene where no independent jurisdictional basis because interests not otherwise represented).

3. State Immunity Is Not Abrogated by 28 U.S.C. § 1362.

The Special Master has ruled that even if state immunity is implicated by the attempts of the Tribes to intervene, that immunity, as against Tribes, has been abrogated by Congress through 28 U.S.C. § 1362. (Spec. Master's Memorandum and Report on Preliminary Issues, pp. 25-30; Spec. Master's Rep., p. 27.)

Eleventh Amendment immunity may be abrogated by Congress authorizing suit against a state pursuant to the state's surrender of sovereign immunity in delegating to Congress its constitutional powers. However, such authorization must "explicitly and by clear language . . . [evidence] an intent to sweep away the immunity of the States." *Quern v. Jordan*, 440 U.S. 332, at 345 (1979). *See also Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-56 (1976); *Edelman v. Jordan*, 415 U.S. 651, 672-73 (1974); *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 282-85 (1973); *Parden v. Terminal Railroad Co.*, 377 U.S. 184, 190-92 (1964). Congress has not abrogated the sovereign immunity of a State in favor of Indian tribes in enacting 28 U.S.C. § 1362 where the United States participates in their behalf. 1 Moore's Federal Practice ¶0.62 [18-3], at 700.70 (1982).

In *Moe v. Confederated Salish and Kootenai Tribes, etc.*, 425 U.S. 463 (1976), this Court determined that 28 U.S.C. § 1362 allowed Indian tribes to sue states in federal courts under limited circumstances without regard to a state's sovereign immunity. The Court indicated that the ability of tribes to bring suit was not intended to entirely abolish a state's sovereign immunity since the intent of Congress was to "open the federal courts to the kind of claims that could have been brought by the United States as trustee, *but* for whatever reason *were not* so brought." *Id.* at 472 (emphasis

added).[55] Where the United States has acted in its capacity as trustee for the Tribes and filed suit against a State, § 1362 does not provide the jurisdictional basis for intervention by the five Tribes. The State Parties contend that the failure of the United States to bring suit is a condition precedent to suit by the five Tribes against the States without their consent and, that such a condition has not been met in this case.

The Special Master concludes that consent of the States to suit is no longer the prevailing interpretation of § 1362. Citing two pre-*Moe* circuit court decisions for the proposition that Congress authorized suits by Indian Tribes only when the United States had declined to act, *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974); *Fort Mojave Tribe v. LaFollette*, 478 F.2d 1016 (9th Cir. 1973), the Special Master interprets *Moe* as a decision by this Court extending the ability of Indian tribes to file suit under § 1362 even when the United States is a party. His ruling ignores this Court's language in *Moe, supra*, while noting that the Court did not actually make a holding on this point. The Special Master argues that Congress could not possibly have intended to limit a Tribe's access to federal courts in view of *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 370 (1978), and other cases. However, *Poafpybitty* only holds that the United States' right to sue does not preclude a tribe's right to sue. It does not address the issue of whether the United States' exercise of its right to bring on action on behalf of a tribe precludes a tribe from suing. The Special Master's use of *Poafpybitty* is misplaced and his interpretation of *Moe* is overly broad. The language in *Moe* is totally consistent with this Court's previous state-

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[55]See Discussion at 1 Moore's Federal Practice, ¶0.62 [18-3], 700.69 Fn.7 (1982).

ments regarding Congressional abrogation of sovereign immunity in *Quern* and *Edelman*, and supports our view as to the Congressional intent in enacting § 1362.[56]

The two post-*Moe* cases cited by the Special Master are also consistent with our view. In *Aguilar v. Kleppe*, 424 F.Supp. 433 (D.C. Alaska, 1976) the court noted with approval the language of *Edelman*:

> In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most overwhelming implications from the text as [will] leave no room for any other reasonable construction.' (citations). *Id.* at 435.

Further, in applying this Court's decision in *Moe* to § 1362, *Aguilar* found that where the United States breaches its trust obligations by failing to file an action, a tribe may sue. *Id.* at 436. In *Confederated Tribes of the Colville Indian Reservation v. State of Washington*, 446 F.Supp. 1339 (E.D.C. Wash., 1978), aff'd in part and rev'd in part on other grounds, 447 U.S. 834 (1980), reh. denied 448 U.S. 911 (1980), the Court relies on *Moe* and *Aguilar* in permitting intervention by tribes where, again, the United States failed to act. Neither *Aguilar* nor *Colville* discuss Congressional

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[56]H.R. Rep. No. 2040, 89th Congr., reprinted in [1966] U.S. Code Cong. & Ad. News 3145. The House Report on the bill which became § 1362 makes clear that Congress only intended to establish jurisdiction on behalf of the Tribes in U.S. district courts in two situations. First, Congress intended to eliminate the then existing $10,000 minimum amount in controversy required for federal question cases under 28 U.S.C. § 1381. Second, Congress intended to "provide U.S. district court jurisdiction in those cases *where the U.S. attorney declines to bring an action* and the tribe elects to bring the action." *Id.* at 3147.

intent or a condition precedent to suit by tribes under § 1362.[57]

In this case, that condition is not satisfied. The United States intervened as trustee to fully represent the interests of the five Tribes permitted intervention by the Special Master. The United States represented the Tribes as to their original claims and continues to do so as to their additional claims. Despite the five Tribes having claimed larger amounts of alleged "practicably irrigable" acreage, the crucial point is that the United States and the five Tribes both asserted claims based on the same legal theories. Therefore, it cannot be said that the United States has declined to assert tribal claims. To conclude that § 1362 was intended so broadly as to allow a tribe to sue every time a difference in the extent of the claim exists carries Congressional intent too far. If as we contend Tribes may sue a State only where the United States fails to bring such action, this Congressional limitation is wholly eliminated if it is deemed met by the Tribes merely going the United States one better in the scope of the claim. § 1362 does not allow suit by the five Tribes under the circumstances of this case.

C. Rule 24 Does Not Permit Intervention by the Tribes in the Present Proceeding.

1. Rule 24 Cannot Circumvent the Jurisdictional Bar Created in Granting the Tribes Leave to Intervene by the Doctrine of Sovereign Immunity.

In granting the Tribes leave to intervene, the Special Master followed the guidance of Rule 24 of the Federal Rules of Civil Procedure. (Spec. Master's Rep., p. 26.)

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[57]*But cf. Oneida Indian Nation v. State of New York*, 520 F.Supp. 1278 (1981) where the court erroneously concludes that Congress intended to abrogate the State's immunity from suit in enacting § 1362 despite finding "[T]he statutory language of § 1362 is inconclusive with respect to Congressional intent." *Id.* at 1305. The court does limit its holding to Indian land claim actions and refers to the *Moe* decision which it finds "strongly suggests that since the United States could have brought these actions on plaintiff's behalf, that these Indian tribes should also be allowed to bring them." *Id.* at 1306.

Although the Special Master concluded that the Tribes should be *permitted* to intervene, his conclusions that government representation "may be" inadequate suggests intervention of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure.

The applicability of the Federal Rules of Civil Procedure to original actions before the Supreme Court is suggested by Supreme Court Rule 9. However, the Federal Rules of Civil Procedure also make clear that *the rules shall not* be construed to *extend jurisdiction*. Rule 82 of the Federal Rules of Civil Procedure. Rule 24 only "states under what circumstances intervention is proper as a matter of procedure but intervention still must be denied, though all the requirements of Rule 24 are met, if the federal court cannot take jurisdiction with regard to the intervenor." C. Wright and A. Miller, 7A Federal Courts, § 1917, at 587 (1972 ed.). The Special Master is in error to rely on Rule 24 to overcome the jurisdictional bar to litigation by Tribes against the States in federal court where consent has not been given by the States.

2. Intervention by the Navajo Tribe Was Previously Denied.

The Special Master has ignored this Court's previous denial of the motion of the Navajo Tribe for leave to intervene in the earlier proceedings. This previous attempt by an Indian Tribe to intervene also alleged inadequate representation by the United States.[58] The Court denied the Navajo Tribe's motion without comment on November 20, 1961. (368 U.S. 917.) A motion for reconsideration was also denied without comment on January 8, 1962. (368 U.S. 950.)

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[58]Motion on Behalf of Navajo Tribe of Indians of the Navajo Reservation, Arizona, New Mexico and Utah for Leave to Intervene, Brief in Support thereof, and Petition of Intervention, September 25, 1961.

The previous denial of the Navajo Tribe's motion is consistent with this Court's holding in *New Jersey v. New York*, 345 U.S. 369 (1953).[59] Although the Special Master contends that "common sense suggests that those most directly affected by the litigation should be able to assert their own interests" (Spec. Master's Memorandum and Report on Preliminary Issues, p. 7), this Court has rejected that rationale in original actions where the United States and States act in their representative capacities. In *New Jersey v. New York* this Court applied the principle of *parens patriae* in denying the City of Philadelphia's request to intervene in an original action before this Court involving an interstate water dispute. Just as Philadelphia was denied intervention on the ground that their interests were adequately represented by the Commonwealth of Pennsylvania which had previously intervened, the Tribes' intervention here should be denied when the United States intervened solely to represent their interests. (Spec. Master's Memorandum and Report on Preliminary Issues, p. 10.) This is especially true where "there can be no more complete representation than that . . . of the United States in acting on behalf of [Indian Tribes] . . .". *Heckman v. U.S.*, 224 U.S. 413, 444 (1912).

Conclusion.

For the reasons stated herein, the State Parties request that the Court do the following:

1) Reject the Special Master's award of any water rights for the so-called "omitted lands" and declare that any additional claims for water for such lands are barred.

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[59]*See generally, Environmental Defense Fund v. Higginson*, 631 F.2d 738; and Hart and Wechsler's The Federal Courts and the Federal System, p. 250 (2d ed. 1973).

2) Reject the Special Master's award of any water rights for the boundary lands until the disputed boundaries are "finally determined," either on remand in these proceedings or through adjudication in which the State Parties are allowed to participate as parties.

3) Assuming, *arguendo*, that any rights are properly awarded for omitted lands and/or boundary lands, reduce the award determined by the Master to correct erroneous determinations as to practicably irrigable acreage.

4) Reject the Special Master's decision to grant the Indian Tribes unconditional intervention and rule that the intervention as granted was improper; and assuming, *arguendo*, that any water rights are properly awarded for omitted lands and/or boundary lands, strike all such rights made pursuant to claims asserted only by the Indian Tribes.

Respectfully submitted,

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APPENDIX A.

Page 12,451

MR. WARNER: If Your Honor please, before I continue with my statement I should like to introduce Mr. Geraint Humphreys, Assistant Regional Solicitor in the Los Angeles Region for the Department of the Interior. Mr. Humphreys has been in charge of the tremendous job of assembling the evidence in connection with the Indian claims, and he will be with us during the time that we are presenting the evidence on the Indian claims.

THE MASTER: You are very welcome, Mr. Humphreys.

MR. WARNER: Yesterday, at the point at which I stopped, Your Honor had inquired about quantum of the reserved waters, and that was exactly the point at which I was ready to go into that subject.

Page 12,455

MR. WARNER: I do not think *Winters* was actually an open end decree.

THE MASTER: I understood you to say a few minutes ago that 20 years after the *Winters* decree, if it turned out they needed more water, they could then prevent the other people from taking it.

MR. WARNER: I think that was implicit in the—

THE MASTER: That is what I meant by an open end decree.

MR. WARNER: The *Winters* case; but I do not believe the decree was actually in terms of an open end decree, but in Conrad Investment—

THE MASTER: It surely was not.

Pages 12,456-7

MR. WARNER: I was going on from that to explain to Your Honor that the decree in Conrad Investment did provide that, if in the future it should appear that that quantity was insufficient for the needs of the Indians on the reservation, then the United States might come back and apply for modification of the decree.

THE MASTER: For an increase.

MR. WARNER: For an increased amount.

THE MASTER: That meant that nobody else, to all intents and purposes, could rationally develop the utilization of the surplus water. You certainly would not want to spend a lot of money for the development.

MR. WARNER: It would have that implication, except for, I suppose, the fact that any modification that was to be granted would be dependent upon the Court's determination. I suppose there is at least that element of protection for others who might be attempting to put the waters to use.

However,—

THE MASTER: You would not want to give an opinion of counsel to an underwriting house selling a bond issue?

Page 12,461

THE MASTER: I take it from what you have just said that you are going to assert a claim for the maximum amount of water necessary for the irrigable acres in the reservation.

MR. WARNER: That is correct, Your Honor.

Pages 12,463-4

MR. WARNER: . . . Aside from the problems which we may have with respect to the Walker River decision we think that under existing conditions on the Indian reservations throughout the Lower Basin, the extent of the irrigable acreage is the only practical basis, as a general proposition, for arriving at a reasonable judgment now of the possible

needs of the Indians for the future. It is for this reason that we propose to offer detailed evidence regarding the irrigable lands.

At the conference here some three weeks ago Your Honor suggested that we might have difficulty with our proof of irrigability. We think that proof must be offered, and that it must be received if the Court is to have before it the information necessary to permit any kind of a determination of the quantities of water which may be available on a firm basis in the Lower Basis for non-Indian use.

To date none of the parties has been put to strict proof of irrigability. We anticipate that the United States, in proving its claims in behalf of the Indians, will be. We think that the irrigability of a tract of land cannot be established without a showing of the land's suitability for irrigation even though it be assumed that water can be gotten, onto the ground.

For that reason the irrigable lands on the reservations have been classified, and some evidence at least of those classifications will be offered. We do have confidence that Your Honor will not exclude this evidence which we think is the very basis of the measure of the quantity of water reserved for the future needs of the Indians.

Pages 12,466-7

MR. WARNER: The problem of reconciling our duty to assert and protect fully the rights of the United States in behalf of their Indian wards with the need for a reasonably firm determination of the unreserved waters available for other uses in order that the maximum utilization of those waters can be provided for is one for which we presently find a proposed solution extremely difficult.

We do invite Your Honor's attention to the open-end decree in the Conrad Investment Company to which I re-

ferred a few minutes ago. We also invite your attention to the fact that the Ninth Circuit in the Ahtanum case, as late as 1956, quoted with approval that Court's language in the earlier case, recognizing the propriety of such a decree.

Pages 12,468-9

MR. WARNER: Going back to the possibility of an open-end decree which might permit modification upon a change of circumstances I would say that we understand the California Courts do follow a similar procedure with respect to the adjudication of riparian rights where there is always the possibility of new developments or different uses under different circumstances in the future.

A nonconclusive decree was proposed in the Walker River case, but was rejected by the Ninth Circuit there. It would have allowed for reservation purposes such amount, not exceeding a maximum amount, as the Government might, from year to year demand at the beginning of the season.

The Court observed that such a decree would be conducive to waste and was not a practical device. We think that a decree which is subject to modification upon a change of circumstances upon application to and consideration by the Court would have built into it protection against the abuses which such an arrangement as that proposed in Walker River might have encouraged. On the other hand, we also have this possible suggestion. If the decree herein does determine the full quantity of the rights reserved for the Indian reservations on the basis of all presently foreseeable needs, including full development of the irrigable lands for which water is claimed, it is perhaps true that any additional quantity which might be required in the future for presently unforeseeable needs would be so unlikely to involve a significant quantity that that possibility can, as a practical matter, properly be excluded from consideration.

Pages 12,471-2

MR. WARNER: . . . We think that the calculations which have been made and which will be proved are fair, not only to the Indians, but fair also to the conflicting users. Although our testimony as to the future requirements will disclose that some improvement in crop yields on the reservations has been anticipated for the future in order to compare with non-Indian agriculture in comparable areas, it will disclose also that efficiency in irrigation practices by Indian farmers at least equal to that achieved on non-Indian projects is anticipated and will of necessity have to be accomplished in order to permit the anticipated production with the water requirements which we will submit as being proper.

Pages 12,560-4

THE MASTER: . . . Haven't you actually relied on the fact that you have sent some people out from the Bureau of Indian Affairs who have looked over the ground, and who are going to come in and swear that in their judgment as experts, 5,000 acres or 30,000 acres, or whatever the number may be are irrigable and capable of irrigation and will profit from irrigation, and that in their judgment over the period of the next few years, or two decades, or three decades that land will come into irrigation and that the crop pattern that they foresee for this land is one that will require so much and so much water? Isn't that what you intend to do?

MR. WARNER: May I answer that, Your Honor?

THE MASTER: Yes.

MR. WARNER: It is the fact that the experts who will testify with respect to the water requirements will demon-

strate that they have analyzed this type of material—the irrigation practices, the cropping practices, which have existed in the past in determining, or at least in aid of their calculations as to the future requirements, and in aid of their calculation as to what to anticipate in the way of possible cropping patterns, and possible practices upon the Indian reservations.

THE MASTER: In effect, you are going to offer all the material upon which the expert relied in anticipation of his opinion. That is an unusual approach.

MR. WARNER: To some extent that is true, but this type of evidence, we think, goes beyond that.

As Mr. Kiechel has explained, and I think it would be merely repetitious for me to go back over it, but we have got this problem of what is the history? What is the history of irrigation on these reservations?

THE MASTER: Why is that a problem?

MR. WARNER: Your Honor referred here a moment ago to the Walker River case.

THE MASTER: Yes. Is that the only reason?

MR. WARNER: I did point out in my opening statement that we assert that what has happened in the past is not the criterion for determining what future requirements are.

THE MASTER: That is why you want to prove the past?

MR. WARNER: But we don't know for sure what Your Honor is going to decide in the end. Whether you feel as other parties have felt as they go along, that they must offer some evidence in anticipation of possibly adverse rulings on their basic contentions.

THE MASTER: Let me give you my understanding of that decision, which is tentative and perhaps it will change

the course of your proof. My notion is that there is nothing incompatible between that decision and the *Winters* case, say, or some of the other decisions. As I read that case, the Court there found that on the basis of an analysis of history, the declining population—that is, the declining Indian population—the very long period during which there has been only minimal use of the land, and so forth and so on, that he could tell the future from the past, and that the future was not going to be any bigger than the past, and therefore he kept the allocation down; and he made a finding on the basis of an 85-year long period of history, if I remember correctly in reading the case. Am I wrong?

MR. WARNER: 70.

THE MASTER: 70; a very long period. That in all human limitations upon capacity to foresee the future, this was a project which just was not going to grow. It had reached its maximum and was, if anything, declining, and that consequently he could make a firm award on the basis of the past; not in defiance of the principle of future use, but in an apparent compliance with it.

Now, if that is so, then it is not up to you to put this proof in. You should proceed on your general hypothesis that the future is the future and that is what you are concerned with. Then, if somebody wants to demonstrate that the future is smaller than the past or that the past is capable of limiting the future, let them offer this proof. Why are you concerned about putting that in as part of your case is what disturbs me.

MR. WARNER: If we could have the confidence that Your Honor would adhere to the analysis you have just stated, I think we would be all for that.

THE MASTER: The alternative is even more favorable. The alternative is what? The alternative is to say that the

rule is different from the *Winters* case, but that we should take proof of the present conditions.

MR. WARNER: It is an attractive invitation.

THE MASTER: All morning I have been troubled—

MR. WARNER: We have not gotten that far in our analysis of it to feel that we could safely proceed on that basis.

THE MASTER: Let me say to you that all morning I have been troubled that perhaps I was missing the point of the presentation because I could not understand why the United States should want to offer this limiting proof. I could understand New Mexico offering it. I could possibly understand Arizona offering it, in an attempt to curtail the allocation to these Indian uses by demonstrating how long and how tedious, how slow has been their rate of development. That would indicate a long and slow rate of development for the future, and that therefore a modest allocation would be in order. I could understand proof of that kind coming in from the contending parties in an effort to limit and restrict the amount of the award that should go to the United States; but I was not able to understand why the United States wanted to put in that kind of data, other possibly than a notion that it was its duty to bring to the attention of the Court all the relevant information.

Well, that is not a duty which I understand is imposed on anybody just to prove your case.

MR. WARNER: No. I do not think that duty exists, at least as far as the claims in behalf of the Indians are concerned. I think it is our duty to prove the Indian claims to the full extent we can prove them.

Page 13,508

THE MASTER: In other words, you are not asking for a decree which would say, "So much water with a ceiling for the future, presently visible requirements" plus the right to come in whenever that expands to ask for more water.

MR. WARNER: We have made that suggestion. I think we made the suggestion of that as a possibility in our opening statement; but I think the United States, just the same as Your Honor and the Court are interested in getting out of this litigation a reasonably stable determination of what the relative rights of all the conflicting users are.

THE MASTER: All right.

Pages 14,150-7

Q (MR. ELY): With respect to all of these reservations on which you testified yesterday, did you in fact attempt to show within your green area or your yellow area all of the land which is in fact irrigable on the basis of soil classification; or did you draw the line short of the total of the irrigable area?

A (MR. RUPKEY, United States' witness): In some cases I would say we drew the line short of the total irrigable area.

Q Why is that?

A Well, the Colorado River, for instance, next to the hills, we used the drain location for the limit of the area and used the spoil bank of the drain as a dike to prevent flood waters from the hills coming out on the irrigated lands; so there were some irrigable lands along the fringe of the hills there that we did not include.

Q Just for example, let us take the one that is illustrated by the display map on the wall, the display map accompanying Exhibit 615; and there has been distributed to us on the same piece of paper temporary exhibits 1 and 1a, 1a

being the land classification map that also is shown on the display map on the wall.

Surely the boundaries of those lands so classified do not have those sharp edges as determined by the land classification. Why did you draw those lines to cut off land that is apparently classified as irrigable?

A Well, we did not propose to enlarge that project any beyond taking in that small area within it which is within the project area.

Q Why not?

A Well, probably the water supply.

Q Then is it fair to say that with respect to your maps generally, they do not show all of the irrigable land on the reservation?

A In general perhaps that is so. I think Fort Mohave—well, on the mesa there would be some irrigable lands that are not shown. I think we have all the bottom lands shown.

Q Fort Mohave you say?

A Fort Mohave.

Q Why didn't you take in all of the mesa lands that were irrigable?

That is shown on Exhibit 1317. Do you have those maps available, Mr. Rupkey; 1317?

A Fort Mohave?

Q Yes.

A Well, I guess we overlooked something there. We probably should have included that.

THE MASTER: I do not quite follow that. You mean you should have included that?

THE WITNESS: Probably we should have included them.

MR. ELY: Q Well, the claim is made here in general terms for the future use of all of the water for all of the irrigable lands. Now, can we rely upon these maps as showing the full extent of the irrigable lands? I take it from your last answer that we cannot.

A I believe that is right. I think we could have included the mesa lands there at Fort Mohave.

Q Are there lands that are irrigable but not shown as such upon your maps with respect to the Colorado River Indian Reservation?

MR. WARNER: If Your Honor please, Mr. Ely might define what he conceives "irrigable" to mean.

THE MASTER: I assume he is using the witness's definition.

MR. ELY: Exactly.

MR. WARNER: The witness has defined "irrigable" as used on these maps as being those lands which could be served by the existing or proposed project.

Now, is Mr. Ely only asking whether there are additional lands in the area which could be served by the existing or proposed works, or is he asking for something else?

THE MASTER: Is that your definition of "irrigable;" those that can be served by existing or those presently proposed on the map? I did not gather that, but maybe that is your definition.

THE WITNESS: That was what we intended; yes. That is our intention. Possibly we should have added some lands that we did not add.

MR. ELY: I am using "irrigable," Your Honor, in whatever sense Mr. Warner used it in his opening, in stating that the irrigable lands constitute the only criterion for the claim for Indian water. What I am now trying to find out

is whether we may rely upon these lands on these maps as limiting that claim or not.

THE MASTER: Is this a Bill of Particulars of that claim, is what you want to know?

MR. ELY: Yes, sir.

THE MASTER: You take this Mohave thing—

MR. WARNER: Mr. Ely might better ask me than the witness.

THE MASTER: No. On this Fort Mohave, this mesa land that you call attention to, could that have been served by existing or proposed works that are shown on the map?

THE WITNESS: No, sir. We would have to put in an additional pumping plant.

THE MASTER: So by the definition that Mr. Warner has applied, you did not make a mistake; is that right?

THE WITNESS: Conforming to these maps, I did not make a mistake.

THE MASTER: All right. Now you want a concession from Mr. Warner as to whether this is a Bill of Particulars?

MR. ELY: Yes.

THE MASTER: Is it, Mr. Warner?

MR. WARNER: The testimony—

THE MASTER: No; the maps.

MR. WARNER: —as reflected by these maps and by the other testimony will define the maximum claim which the United States is asserting in this case.

THE MASTER: No. The question is whether the maps illustrate and define the term "irrigable" as used in your claim.

MR. WARNER: I might say that I am probably not authorized to give anything away that we ought to claim. On the other hand, I can give this assurance: that we do not

propose to ask a decree allowing water in favor of the—for use on the Indian reservations in excess of the proof that we are offering in this matter.

THE MASTER: I understand that. The question is whether these maps constitute the definition of what you regard as irrigable. I think it is a fair question.

MR. WARNER: Well, Your Honor, that is how we are defining "irrigable" for the purpose of proving the claim that is being asserted.

THE MASTER: It is those maps that are shown in yellow and green and crosshatched on these maps?

MR. WARNER: That is correct.

THE MASTER: And although there may be other irrigable lands within those reservations, those you do not lay any claim for the service of water upon?

MR. WARNER: That is correct.

THE MASTER: All right. That is what we know, and that is the way we are going to be bound. This is a statement that I will take seriously.

MR. WARNER: It may be that a mistake such as Mr. Rupkey has just suggested may have been made. In that case we would have to ask leave to correct it.

THE MASTER: He just stated that he did not make a mistake.

MR. WARNER: All right.

THE MASTER: Because he has limited himself; and I take it now by what you say, you are limiting yourself by lands which are irrigable from works presently existing or which are shown as proposed on these maps.

The Mohave lands to which he has referred on the mesas are not capable of being so serviced. Now, I want you to realize that you are now limiting your claim to those lands

as irrigable within that definition; namely, those capable of being served by existing works or proposed works as shown on these maps and as defined in color on these maps in green, yellow and green crosshatching.

MR. WARNER: If Your Honor should make a report recommending a decree allowing all of the water that is necessary for those purposes, we will be satisfied.

THE MASTER: That is not a condition I will accept. I shall assume that the categories of lands indicated on the Indian reservations on these maps constitute your Bill of Particulars to what you regard as irrigable within the terms of the United States claim, subject to correction that you can bring to our attention if there is some clerical error, in the course of the trial; but otherwise, I shall assume that that is your Bill of Particulars.

MR. WARNER: I might say that I think—

THE MASTER: That is your intention.

MR. WARNER: —that I think is correct. It should perhaps be modified that it is the definition of our claim for the right to use waters of the Colorado River or of the Colorado River system.

THE MASTER: Yes; on the Indian reservations.

MR. WARNER: On the Indian reservations.

APPENDIX B.

United States
Deparment of the Interior
Office of the Solicitor
Washington, D.C. 20240

JAN 3 1979

Mr. Robert P. Will
General Counsel
The Metropolitan Water District
of Southern California
Box 54153
Los Angeles, CA 90054

Dear Mr. Will:

Secretary Andrus has asked me to respond to your letter of December 11, 1978, concerning the resolution of Indian boundary disputes for reservations along the Lower Colorado River. In December 1978, the Solicitor General of the United States filed a petition in the Supreme Court in which additional water is sought for each of the five reservations. The petition, a copy of which is enclosed, sets forth with specificity the position of the United States with respect to each of the boundary determinations and the legal effect of the various determinations made by this Department.

None of the five tribes have made application for further boundary changes so far as I am aware. Our office does not plan to recommend the initiation of any district court litigation to adjudicate reservation boundaries. For our purposes, we consider the administrative determinations to be final.

You asked us to advise you as to any administrative procedures available to challenge this Department's administrative determinations in settling the reservation boundary questions. While decisions of subordinate officials are sub-

ject to an elaborate review procedure within the Department, there are no comparable procedures available for the review of Secretarial decisions. Review of such matters must take place in a judicial forum.

In the event this letter and the enclosure does not fully answer your questions, please feel free to contact Mr. Dan Rosenfelt of my staff who will be pleased to provide you with such additional information as you may need. Mr. Rosenfelt can be reached at (202) 343-6967.

Sincerely,

/s/ Frederick N. Ferguson
Deputy Solicitor

APPENDIX C.

United States Court of Appeals
Eleventh Judicial Circuit

December 18, 1981

TO: COUNSEL FOR STATE PARTIES AND TRIBES:

Re: Original No. 8
Arizona v. California

I enclose copies of some of the computations I have performed in this case. In order that I may be sure that I understand the payment capacity analysis employed by the State Parties, I have altered some of the data, which serve as input into the formula which is evidenced in S.P. Exhs. 119, 120, and made the enclosed computations. I realize that the Tribes object to the method of "computing interest on water cost" and that the State Parties favor the data which was actually used in the exhibits such as S.P. Exhs. 119, 120, but I merely wish to ask you if from the enclosed computations I evidence a correct understanding of the interest on water cost theory and have correctly made computations based on revised input data.

I would appreciate receiving your comments within twenty days.

Sincerely,
/s/ Elbert P. Tuttle
Elbert P. Tuttle
Special Master

EPT:bk
Enc.
cc: All Parties

ALMONDS -5

11	12	13		30
2000	2000	2000	. . .	2000
1220	1220	1220	. . .	1220
392	392	392	. . .	392
76	76	76	. . .	76
57	57	57	. . .	57
10	10	10	. . .	10
79	35	—	. . .	—
146	102	67		67
160	160	160	. . .	160
774	730	695		695
(446)	(490)	(525)	. . .	(525)
346	(144)	(669)	. . .	(9594)

ALMONDS - 6

Net Cash Flows:

Year 12 = $ 144

Years 13-30 = $ 525/yr

Present Value of $525 received in years 13-30 is:

$ 525 × 8.2014 × .3186 = $1372

Present Value of $144 received in year 12 is:

$ 144 × .3186 = $45.88

Present Value of All Cash Flows is:

$1372 + $46 = $1418

Annualized Amount over

30 years $1418

9.4269 = $ 150

Annaul Payment Capacity

$ 150

APPENDIX D.

FOR TABLE GRAPES
USING YIELD OF 450 LUGS PER ACRE [a]

Year	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Yield — tons per acre	—	—	2.7	3.6	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95
Gross Income @ $680/ton	—	—	1,836	2,448	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366
Pre-Harvest Cost [b]	1,300	1,086	951	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077
Depreciation [b]	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113
Interest on Investment @ 10%																
Irrigation System [b]	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57
Building, Equip. & Tractor [b]	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28
Interest on Accumulated Net Cost	—	172	341	402	446	439	431	423	414	404	392	380	367	352	336	318
Total Interest	85	256	426	487	531	524	516	508	499	489	477	465	452	437	421	403
Harvest Cost [c]	—	—	737	979	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350
Payment Capacity	226	226	226	226	226	226	226	226	226	226	226	226	226	226	226	226
Total Annual Cost	1,724	1,682	2,453	2,882	3,297	3,290	3,282	3,274	3,265	3,255	3,243	3,231	3,218	3,203	3,187	3,169
Net Annual Cost or (Profit)	1,724	1,682	617	434	(69)	(76)	(84)	(92)	(101)	(111)	(123)	(135)	(148)	(163)	(179)	(197)
Accumulated Net Cost or (Profit)	1,724	3,406	4,023	4,457	4,388	4,312	4,228	4,136	4,035	3,924	3,801	3,666	3,518	3,355	3,176	2,979

(a) Based on Exhibit SP 121 revised to show effects of changing yield to 450 lugs per acre (4.95 tons per acre).
(b) Values from Table C-6 in Boyle report. [FM Exh. 1; CR Exh. 1]
(c) Values represent Boyle harvest cost prorated based on yield.

APPENDIX D.

FOR TABLE GRAPES
USING YIELD OF 450 LUGS PER ACRE [a]

: 17	: 18	: 19	: 20	: 21	: 22	: 23	: 24	: 25
4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95
3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366
1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077
113	113	113	113	113	113	113	113	113
57	57	57	57	57	57	57	57	57
28	28	28	28	28	28	28	28	28
298	276	252	226	197	165	130	92	50
383	361	337	311	282	250	215	177	135
1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350
226	226	226	226	226	226	226	226	226
3,149	3,127	3,103	3,077	3,048	3,016	2,981	2,943	2,901
(217)	(239)	(263)	(289)	(318)	(350)	(385)	(423)	(465)
2,762	2,523	2,260	1,971	1,653	1,303	918	495	30

Office - Supreme Court, U.S.
FILED
MAY 24 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981
No. 8, Original

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

EXCEPTIONS OF THE CALIFORNIA AGENCIES TO THE REPORT OF SPECIAL MASTER ELBERT P. TUTTLE; BRIEF OF SAID PARTIES IN SUPPORT OF EXCEPTIONS.

Names and addresses of attorneys on inside front cover.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE I

ALMONDS

Yield = 2000 lbs/acre (in shell)

Price = 61¢ lb. (in shell) (1975-1979 Average)

Pre-Harvest and Harvest Costs reduced to 1[illegible] level

Interest = 10%

Year	1	2	3	4	5	6	7	8	9	10
Yield - lbs. per acre	—	—	—	800	1310	1600	1850	2000	2000	2000
Gross Income at 61¢/lb.	—	—	—	488	799	976	1129	1220	1220	1220
Pre-Harvest Cost	745	173	261	374	392	392	392	392	392	392
Depreciation	76	76	76	76	76	76	76	76	76	76
Interest on Investment at 10%										
Irrigation System	57	57	57	57	57	57	57	57	57	57
Building, Equipment & Tractor	10	10	10	10	10	10	10	10	10	10
Interest on Accumulated Net Cost	—	104	161	232	281	311	328	332	328	323
Total Interest	67	171	228	299	348	378	395	399	395	390
Harvest Cost	—	—	—	79	130	151	157	160	160	160
Payment Capacity	150	150	150	150	150	150	150	150	150	150
Total Annual Cost	1038	570	715	978	1096	1147	1170	1177	1173	1168
Net Annual Cost or (Profit)	1038	570	715	490	297	171	41	(43)	(47)	(52)
Accumulated Net Cost or (Profit)	1038	1608	2323	2813	3110	3281	3322	3279	3232	3180

11	12	13	14	15	16	17	18	19	20
2000	2000	2000	2000	2000	2000	2000	2000	1000	2000
1220	1220	1220	1220	1220	1220	1220	1220	1220	1220
392	392	392	392	392	392	392	392	392	392
76	76	76	76	76	76	76	76	76	76
57	57	57	57	57	57	57	57	57	57
10	10	10	10	10	10	10	10	10	10
318	312	306	299	292	283	274	264	253	241
385	379	373	366	359	350	341	331	320	308
160	160	160	160	160	160	160	160	160	160
150	150	150	150	150	150	150	150	150	150
1163	1157	1151	1144	1137	1128	1119	1109	1098	1086
(57)	(63)	(69)	(76)	(83)	(92)	(101)	(111)	(122)	(134)
3123	3060	2991	2915	2832	2740	2639	2528	2406	2272

21	22	23	24	25	26	27	28	29	30
2000	2000	2000	2000	2000	2000	2000	2000	2000	2000
1220	1220	1220	1220	1220	1220	1220	1220	1220	1220
392	392	392	392	392	392	392	392	392	392
76	76	76	76	76	76	76	76	76	76
57	57	57	57	57	57	57	57	57	57
10	10	10	10	10	10	10	10	10	10
227	212	196	178	159	137	113	87	58	26
294	279	263	245	226	204	180	154	125	93
160	160	160	160	160	160	160	160	160	160
150	150	150	150	150	150	150	150	150	150
1072	1057	1041	1023	1004	982	958	932	903	871
(148)	(163)	(179)	(197)	(216)	(238)	(262)	(288)	(317)	(349)
2124	1961	1782	1585	1369	1131	869	581	264	(85)

TABLE 2
ALMONDS
Different method of computation.
Reaches same payment capacity as
in Table 1

Year	1	2	3	4	5	6	7	8	9	10
Yield - lbs. per acre	—	—	—	800	1310	1600	1850	2000	2000	2000
Gross Income at 61¢/lb.	—	—	—	488	799	976	1129	1220	1220	1220
Pre-Harvest Cost	745	173	261	374	392	392	392	392	392	392
Depreciation	76	76	76	76	76	76	76	76	76	76
Increase on investment at 10%										
Irrigation System	57	57	57	57	57	57	57	57	57	57
Building, Equipment & Tractor	10	10	10	10	10	10	10	10	10	10
Interest on Accumulated Net Cost	—	89	129	183	212	220	212	190	157	120
Total Interest	67	156	196	250	279	287	279	257	224	187
Harvest Cost	—	—	—	79	130	151	157	160	160	160
Total Annual Cost	888	405	533	779	877	906	904	885	852	815
Net Annual Cost or (Profit)	888	405	553	291	78	(70)	(225)	(335)	(368)	(405)
Accumulated Net Cost or (Profit)	888	1293	1826	2117	2195	2125	1900	1565	1197	792

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54

TABLE OF CONTENTS

Page

Exceptions of the California Agencies to the Report of Special Master Elbert P. Tuttle 1

Statement of Exceptions 2

I.

Exceptions Relating to the Special Master's Conclusion That Certain Disputed Boundaries of the Indian Reservations Were "Finally Determined" Within the Meaning of Article II(D)(5) of the 1964 Decree and His Consideration of Lands so Added for Adjustment of the Decreed Water Allocations of Those Reservations. (Spec. Master's Rep. pp. 55-76.) 2

A. The Issue 2

B. The Determinations to Which Exception Is Taken 2

C. The Correct Conclusions 3

Page

Brief of California Agencies in Support of Exceptions 5

Preface 5

Summary of Position 5

Argument 9

I.

The Boundaries of the Reservations Have Not Been Finally Determined; Thus, No Additional Allocation of Water Can Be Made 9

A. Introduction 9

B. The History of This Proceeding Indicates That the Special Master Has Erroneously Interpreted This Court's 1964 Decree 10

C. This Court, Under the Circumstances Presented in This Case, Is an Appropriate Forum to Determine the Boundary Issues, Through Proceedings Before a Special Master 14

II.

The Portion of the Westerly Boundary of the Colorado River Indian Reservation Described as "Down the West Bank" of the Colorado River, Is the Bank of That River as It Now Exists Subject to the Usual Rules of Erosion, Accretion and Avulsion 18

A. Background 21

B. The Call "Down the West Bank" Designated a Moving Boundary 23

C. The Solicitor's Reasoning as to Why the Line Was Fixed Permanently as of 1876 Has No Legal Support 28

Page

III.

The 1978 Solicitor's Opinion Purporting to Void an 1893 Agreement Between the United States and the Quechan Tribe and to Restore Some 25,000 Acres of Land to the Fort Yuma Indian Reservation Is in Error 34

A. Background 35

B. The Issue 39

C. Argument 40

1. The Basic Premise of the Krulitz Opinion Is Erroneous 41

2. The 1893 Agreement, as Ratified by Congress in 1894, Embodied a Present Cession of All Quechan Lands to the United States in Return for a Promise by the United States to Make Allotments to Individual Indians, Provide Irrigation for Those Lands, Sell the Remaining Irrigable Acreage for the Quechans' Benefit, and Open the Ceded Non-irrigable Lands to Settlement 43

3. The Irrigation Program Under the 1904 Act Was Intended to Fulfill the United States' Obligations Under the 1893 Agreement 48

4. The Administrative Treatment of the Disputed Area Prior to 1936 Is Inconclusive and, in Any Event, Cannot Vary the Plain Language of the 1893 Agreement 49

5. The Krulitz Opinion Is Contrary to Two Judicial Opinions Interpreting the 1893 Agreement 50

Page

IV.

The Westerly Boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation Is the East Bank of the Colorado River in Its Last Natural Position 53

A. Background 55

B. The Colorado River Was Intended to Be the Westerly Boundary of the Hay and Wood Reserve 60

C. A Correct Resurvey Demonstrates That There Are No Ambiguities in the Description of the Hay and Wood Reserve 63

V.

The Special Master Has Erred in Awarding Water to River Bed Lands Since Those Lands Belong to California and Arizona, Respectively 66

VI.

Conclusion 66

TABLE OF AUTHORITIES

Cases	Page
Alabama v. Georgia, 64 U.S. (23 How.) 505 (1860)	24, 25, 31
Arkansas v. Tennessee, 246 U.S. 158 (1918)	24
Arkansas v. Tennessee, 397 U.S. 88 (1970)	24, 63
Arizona v. California, 283 U.S. 423 (1931)	27
Arizona v. California, 373 U.S. 546 (1963)	10, 11, 16, 19, 38, 54
Arizona v. California, 376 U.S. 340 (1964)	9, 19, 51, 52, 54
Arizona v. California, 439 U.S. 419 (1979)	14, 19, 54
Barney v. Keokuk, 94 U.S. 324 (1877)	29
Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10 (1935)	16
Burkett v. Chestnutt, 212 S.W. 271 (Tex. Civ. App., 1919)	61
California v. Superior Court (Fogerty), 29 Cal.3d 240 (1981)	31
California v. Superior Court (Lyon), 29 Cal.3d 210 (1981)	31
Chippewa Indians of Minnesota v. United States, 90 Ct. Cls. 140 (1940)	49
Cocapah Tribe of Indians v. Morton, 70-573-PHX-WEC (D. Ariz. 1975)	13
County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46 (1874)	24, 31, 61, 62, 63, 64
Cragin v. Powell, 128 U.S. 691 (1888)	16
Gila River Pima-Maricopa Indian Community v. United States, 467 F.2d 1351 (1972)	49
Hiltscher v. Wagner, 96 Cal.App. 66 (1928)	64

Page

Howard v. Ingersoll, 54 U.S. (13 How.) 380 (1851) . 24
Indiana v. Kentucky, 136 U.S. 479 (1890) 24
Kansas v. Missouri, 322 U.S. 213 (1944) 24, 62
Kickapoo Tribe of Kansas v. United States, 372 F.2d 980 (1967) 47
Knight v. United States Land Association, 142 U.S. 161 (1891) 16
Missouri v. Iowa, 48 U.S. (7 How.) 660 (1849) 51
Missouri v. Nebraska, 196 U.S. 23 (1904) 24, 63
Montana v. United States, 450 U.S. 544 (1981) 66
Mumford v. Wardwell, 73 U.S. (6 Wall.) 423 (1867) 27, 29
Nebraska v. Iowa, 143 U.S. 359 (1892) 24, 28
New Mexico v. Colorado, 267 U.S. 30 (1925) 51
Ohio v. Kentucky, 444 U.S. 335 (1980) 24, 27
Oklahoma v. Texas, 260 U.S. 606 (1923) 25, 26, 28, 30, 31
Packer v. Bird, 137 U.S. 661 (1891) 25, 29
Peoria Tribe of Indians v. United States, 390 U.S. 468 (1968) 47
Pollard v. Hagen, 44 U.S. (3 How.) 212 (1845) 27, 29
Russell v. Maxwell Land Grant Co., 158 U.S. 253 (1895) 16
Shoshone Indians v. United States, 324 U.S. 335 (1945) 40
Stone v. United States, 69 U.S. (2 Wall.) 525 (1865) 51
Stoneroad v. Stoneroad, 158 U.S. 240 (1895) 16
United States v. Aranson, Ninth Circuit No. 77-2295 27

Page

United States v. Blackfeather, 155 U.S. 180 (1894) .. 47

United States v. Brigham Young University, 73-3058-DWW (U.S.D.C. 1976) 13

United States v. Curtis, 72-1624-DWW (U.S.D.C. 1977) 13

United States v. Denham, 73-495-ALS (U.S.D.C. 1975) 13

United States v. Johnson, Civil No. 118-C (S.D. Cal., August 2, 1935) 50, 51

United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498 (1913) 47

United States v. Myers, 206 F. 387 (8th Cir. 1913) .. 45

United States v. Redondo Development Co., 254 F. 656 (8th Cir. 1918) 64

United States v. Reimann, 504 F.2d 135 (10th Cir. 1974) 64

United States v. State of Louisiana, 229 F.Supp. 14 (Lafayette Division 1964) 17

United States v. Texas, 162 U.S. 1 (1896) 51

United States v. Walker, Civil No. 126-J (S.D. Cal., October 10, 1933) 50, 51

White v. Luning, 93 U.S. 514 (1876) 64

Winters v. United States, 207 U.S. 564 (1908) 6, 10, 15, 18

Miscellaneous

Executive Order, November 27, 1873 21

Executive Order, November 16, 1874 21

Executive Order, May 15, 1876 ..... 18, 22, 26, 27, 28

Executive Order, January 9, 1884 35

Executive Orders of December 1, 1910 and February 2, 1911 57

Page

Executive Order, November 22, 1915 22
Indian Claims Commission Docket No. 320 38
Senate Executive Document No. 68, 53rd Cong., 2d Sess., pp. 3 n. 9, 14-16, 19-22 (1894) 35, 36
Solicitor's Opinion, M-28198 (January 8, 1936) 34, 38, 39, 48, 49, 50, 51
Solicitor's Opinion (June 12, 1968) 34, 38, 48, 51
Solicitor's Opinion, M-36886 (January 18, 1977) 84 I.D. 1 (1977) 34, 35, 39, 40, 48, 49, 50, 51
Solicitor's Opinion (December 20, 1978) 86 I.D. 3 ... . 34, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50, 51

Statutes

Act of February 15, 1893 (27 Stat. 456) 35
Act of March 3, 1893 (27 Stat. 612, 633) 35
Act of August 15, (1894) 28 Stat. 286, 335 .... 36, 37, 42, 48
California Civil Code, Sec. 830 ..... 29, 31
Indian Appropriations Act of 1904, 33 Stat. 189, 224 ..... 37, 40, 48
Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U.S.C. Sec. 371 et seq. 37, 48
22 Statutes at Large 181 (1882) 57
36 Statutes at Large, pp. 1059, 1063 ..... 37, 52

Textbooks

11 Corpus Juris Secundum, Sec. 47 64
Kappler, Indian Affairs — Laws and Treaties (1904), p. 832 35
Price, Law and the American Indian, pp. 531-51 (1973) 41

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Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

EXCEPTIONS OF THE CALIFORNIA AGENCIES TO THE REPORT OF SPECIAL MASTER ELBERT P. TUTTLE.

The Metropolitan Water District of Southern California, the Palo Verde Irrigation District, the Imperial Irrigation District, the Coachella Valley Water District, the City of Los Angeles, the City of San Diego and the County of San Diego (hereinafter "California Agencies") hereby file these Exceptions to the Report of Special Master Elbert P. Tuttle, dated February 22, 1982, pursuant to the order of the Court, dated April 5, 1982.

These exceptions are based on the grounds, to be developed in our supporting brief, that the determinations of the Special Master are erroneous and are contrary to the evidence and the law.

STATEMENT OF EXCEPTIONS.

The California Agencies except to the Report of the Special Master, dated February 22, 1982, upon the following grounds:

I.

EXCEPTIONS RELATING TO THE SPECIAL MASTER'S CONCLUSION THAT CERTAIN DISPUTED BOUNDARIES OF THE INDIAN RESERVATIONS WERE "FINALLY DETERMINED" WITHIN THE MEANING OF ARTICLE II(D)(5) OF THE 1964 DECREE AND HIS CONSIDERATION OF LANDS SO ADDED FOR ADJUSTMENT OF THE DECREED WATER ALLOCATIONS OF THOSE RESERVATIONS. (Spec. Master's Rep. pp. 55-76.)

A. The Issue.

Whether the disputed boundaries of the respective Indian reservations have been "finally determined" within the meaning of Article II(D)(5) of the March 9, 1964 Decree, permitting adjustment by this Court of the reservation water allocations?

B. The Determinations to Which Exception Is Taken.

The Special Master erroneously concludes that:

The determinations that have been made through certain orders of the Secretary of the Interior and certain trial court judgments with respect to the disputed boundary changes may be accepted as final for the purpose of considering additional allocations of water rights to the reservations.

C. The Correct Conclusions.

The Special Master should have concluded:

The orders of the Secretary of the Interior and the judgments in the federal court cases are not final determinations of reservation boundaries for purposes of establishing water rights. The Secretarial orders relied on by the Tribes are functional for Department of the Interior administrative purposes, but cannot be considered final for the purpose of establishing claims for federally reserved water rights. The federal court judgments do not have *res judicata* effect on the rights of the California Agencies who were not parties to the actions nor in privity with any party. The United States and the Tribes must first establish through adjudication with the contesting California Agencies in other litigation or in these proceedings the disputed boundaries upon which they rely for claims of additional water allocations.

WHEREFORE, the California Agencies request that the Court rule on these Exceptions to the Report of Special Master Tuttle, that the Court decide this cause in the manner indicated above, and that the Court issue such further orders as it deems proper.

Respectfully submitted,

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By CARL BORONKAY.

IN THE

Supreme Court of the United States

October Term, 1981
No. 8, Original

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFONRIA, *et al.*

BRIEF OF CALIFORNIA AGENCIES IN SUPPORT OF EXCEPTIONS.

Preface.

The Metropolitan Water District of Southern California, the Coachella Valley Water District, the City of Los Angeles, the City of San Diego and the County of San Diego (hereinafter "California Agencies") are the California parties most directly affected by additional water allocations to the reservations based upon claims of enlarged reservation boundaries. Hence we file this separate brief for the purposes of illustrating that the claims of those additional water allocations are premature and to describe in greater detail the nature and scope of the boundary disputes as to the Colorado River, the Fort Yuma, and the Fort Mojave Indian Reservations.

Summary of Position.

This case was commenced in 1952 by Arizona to confirm its rights to Colorado River water. It developed into an adjudication of the rights of lower basin states (Arizona, California and Nevada), and the United States. The inter-

vention of the United States was on behalf of various federal facilities, including the five Indian reservations along the lower Colorado River. The legal basis for these alleged rights was the *Winters* doctrine, or rights impliedly reserved as an incident of establishing the Indian reservations. A factual issue raised in the original proceedings was whether certain lands for which *Winters* rights were sought were situated within the proper reservation boundaries ("the boundaries issue"). This issue was tried by the parties as to the Colorado River and Fort Mojave reservations. No one objected to the propriety of raising and trying those questions. The determinations of the Special Master were generally favorable to the State Parties contesting those boundaries asserted by the United States and the Master allocated water for those two reservations, based upon his determinations of the true reservation boundaries and his findings as to "practicably irrigable acreage" within those reservations.

This Court, in considering the report and recommendations of that special Master, stated it was not necessary to decide the reservation boundaries, but adopted the Master's recommended water allocations for each of the reservations based in part upon his determinations of the true boundaries. The Decree entered by the Court in 1964 provided for adjustment of these water allocations should the disputed boundaries be "finally determined."

The current proceedings are based upon reference by this Court to a Special Master of a motion of the United States to modify the 1964 Decree to grant additional water rights to the five reservations. The United States asserted that additional practicably irrigable acreage exists within these reservations for which water rights were not allocated in the 1964 Decree. The alleged bases for the new claims of water rights for that acreage are (1) resolution of contested res-

ervation boundaries since entry of that decree and (2) failure of the United States to seek a water allocation for particular lands within the reservations as they were recognized in 1964, so called, "omitted lands."

With respect to the first category, the responding State Parties again contested the new boundaries asserted by the United States and the five Tribes who were permitted to intervene as parties. Unlike the original proceeding, the Special Master adopted the position of the United States that, because the Secretary of the Interior has the authority to survey and fix boundaries of Indian reservations, they must be recognized as binding and conclusive upon those not claiming title to such lands. Accordingly, the Master recognized no triable issue of whether lands for which a new water allocation was claimed were indeed within the respective Indian reservations.

The State Parties, then, even though their water rights would be directly and severely affected by the awarding of additional water for Indian reservations due to the latters' senior priority, were prohibited from showing that substantial acreage depicted by the United States as part of the Colorado River, Fort Mojave and Fort Yuma reservations were, in fact, not reservation lands.

In our exception and supporting arguments we will show that the United States and the Tribes have failed to meet this Court's requirement under Article II(D)(5) of the 1964 Decree that the reservations' water allocations may be adjusted only after the disputed boundaries are finally determined and that it would be appropriate and in the interests of all parties herein to determine them in these proceedings. We will also explain the very substantial nature of the State Parties' challenges of the enlarged boundaries advanced by

the United States, thereby illustrating the injustice that would be perpetrated should the Special Master's ruling, shielding the Secretary's boundary actions, be adopted by this Court.

ARGUMENT.

I.

THE BOUNDARIES OF THE RESERVATIONS HAVE NOT BEEN FINALLY DETERMINED; THUS, NO ADDITIONAL ALLOCATION OF WATER CAN BE MADE.

A. Introduction.

The United States and the Tribes have raised substantial claims of practicably irrigable acres predicated in part upon their assertion that boundary disputes as to the Colorado River, Fort Yuma and Fort Mojave Indian Reservations have been finally determined within the meaning of the Court's 1964 decree which provided:

> ". . . the quantities fixed in this paragraph [Fort Mojave Indian Reservation] and paragraph (4) [Colorado River Indian Reservation] shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined; . . ." *Arizona v. California*, 376 U.S. 340, 345 (1964).

The United States and the Tribes have asserted, and Special Master Tuttle (hereinafter "Special Master") has accepted, certain unilateral administrative actions of the Secretary of the Interior and certain district court cases involving title claims, in which the California Agencies were not parties, as final determinations of the boundaries[1] which may not be challenged in this action. By so ruling, the Special Master has accepted evidence as to the practical irrigability of the lands in dispute, while rejecting the California Agencies' contention that the claimants must first establish that disputed lands are within the reservations.

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[1]Motion of the United States for Modification of Decree and Supporting Memorandum, December 1978, pp. 8-17; 1982 Report of Special Master Tuttle, February 22, 1982, p. 63 (hereinafter 1982 Report).

The Special Master has erred in accepting such actions as final determinations of disputed boundaries and by declining to determine such boundaries in this proceeding. We shall demonstrate:

(1) The history of this proceeding indicates that the Special Master has erred in his interpretation of the Court's 1964 decree; and

(2) This Court, under the circumstances presented, is the appropriate forum to determine the boundary issues.

B. The History of This Proceeding Indicates That the Special Master Has Erroneously Interpreted This Court's 1964 Decree.

As is set forth more fully in the brief of the State Parties, the relevance of the boundary dispute arises in connection with the *Winters*[2] rights of the Tribes. *Winters* held that Congress, at the creation of the reservations, intended to reserve water for the needs of the reservations. Since no quantification standard was enunciated, this Court was faced in *Arizona v. California*, 373 U.S. 546 (1963) with establishing a quantification standard for the reservations in the lower Colorado River Basin. Thus, the Court determined that the number of practicably irrigable acres on each reservation would fairly provide for the existing and future needs of the Tribes. (*Id.* at 601.)

Thus, in this case, two elements of a *Winters* right must be established prior to a determination of water allocations — the land must be determined to be within the reservation and it must be practicably irrigable.

Therefore, in the prior proceeding, Special Master Rifkind (hereinafter "former Master") accepted evidence as

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[2]*Winters v. United States*, 207 U.S. 564 (1908).

to the extent of reservation lands, as well as their irrigability where disputes over the boundaries of two reservations arose.[3] After a full evidentiary hearing on the matters, the former Master ruled generally in favor of the California position with the exception of two avulsive changes. (Report of the former Master, pp. 269-287.)

This Court then accepted for purposes of water allocations the acreages as determined by the former Master, but rejected his boundary determinations for other purposes:[4]

> ". . . the various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable.
>
> "We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave [sic] Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time." (*Arizona v. California*, *supra*, 373 U.S. at 601.)

The Court, however, recognized that these boundary disputes might be finally determined at a later time, and thus provided for modification in that event.

The Special Master here reasons that this Court's rejection of the boundary determinations contradicts the State Parties position that "finally determined" means decided through trial proceedings with those parties.

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[3]Colorado River Indian Reservation and the Fort Mojave Reservation.

[4]Such a rejection may have been predicated upon the concern of the California Parties, that private land claimants were not parties to the action. (See, Opening Brief of the California Defendants in Support of Their Exceptions to the Report of the Special Master, May 22, 1961, pp. 279-282.)

> "The model of the previous treatment of the boundary determinations by the Court itself much weakens the contention of the State Parties." (1982 Report, p. 65.)

Thus, he treats unilateral orders of the Secretary of the Interior,[5] which basically encompass the positions of the United States which were rejected in the prior proceedings, as final boundary determinations. But as demonstrated above, the Court was well aware of the disputed boundaries of the Colorado River and Fort Mojave Reservations and accepted the former Master's determinations as to those boundaries for water allocation purposes. Thus, the model of the prior proceeding clearly indicates that boundaries of the reservations were determined in an adversarial proceeding involving the interested parties.

The acceptance by this Court of the boundaries of the reservations as determined by the former Master for water allocation purposes, makes clear that the Court's provisions for modification of the decree in the event of final determination of boundaries did not intend to encompass the unilateral administrative actions accepted by the Special Master here.

Can it be reasonably believed that this Court, with full knowledge of the disputed boundaries as to the Colorado River and Fort Mojave Indian Reservations and with full knowledge of the determination of the former Master generally in favor of the California positions, would then deem a disputed boundary is finally determined, when the losing

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[5]The Special Master has accepted as final a January 17, 1969 Order of the Secretary of the Interior relating to the Colorado Indian Reservation, a December 20, 1978 Order of the Secretary of the Interior relating to the Fort Yuma Reservation, and a June 3, 1974 Order of the Secretary relating to the Fort Mojave Reservation. The merits of those orders are discussed in detail *infra*.

claimant in the prior adversary proceeding issues a unilateral administrative order? This is the effect of the ruling of the Special Master.

Moreover, the Special Master relies not only upon these unilateral administrative decisions, but also upon district court cases[6] in which the California Agencies were not represented. Such reliance is clearly unjustified as the California Agencies may not be required to rely upon the litigation efforts of third parties. The Special Master would appear to recognize such a principle when he finds that these acts are not *res judicata* on those not parties to such proceedings. (1982 Report. pp. 63-64.) The California Agencies, not having been parties to these private cases, have had no opportunity to protect their rights which depend in part upon whether the land is within or without the reservation. Moreover, this is a water case, not a land case (1982 Report, p. 64); thus the interests sought to be protected in this case are significantly different than those in land suits. Indeed, it would be especially unjust in this instance to allow reliance upon cases where many were not subject to searching judicial scrutiny, but were resolved instead by stipulations.[7] The California Agencies have direct and substantial interests in the water which is derived from the status of the land — interests which they are entitled to protect. It cannot be accepted that this Court contemplated that the California Agencies' invaluable water rights could

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[6]1982 Report, p. 63. See also, Motion of the United States for Modification of Decree and Supporting Memorandum, December 1978, pp. 17-23.

[7]Stipulated judgments were entered in the following cases: *United States v. Denham*, 73-495-ALS (U.S.D.C. 1975); *United States v. Curtis*, 72-1624-DWW (U.S.D.C. 1977); *Cocapah Tribe of Indians v. Morton*, 70-573-PHX-WEC (D. Ariz. 1975); *United States v. Brigham Young University*, 73-3058-DWW (U.S.D.C. 1976).

be diminished on the basis of third party litigation without the participation of the California Agencies.

Finally, it must be noted that this Court's language in its 1979 Supplemental Decree in this case supports the California Agencies' claims that this Court did not intend, nor will it accept, these unilateral actions as final determinations of boundary disputes. The Court wrote:

> ". . . provided that the quantities fixed in paragraphs (1) through (5) of Article II(D) of said [1964] Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Arizona v. California*, *supra*, 439 U.S. at 421.

Thus, it is clear that the parties in requesting entry of this Order and this Court in making the Order regarded the boundaries as still in dispute. Otherwise, it would make no sense to so word the provision for most of the actions upon which the Special Master relies occurred prior to the entry of the Order.

It is clear that the Special Master has erroneously interpreted this Court's 1964 decree in accepting as final certain unilateral administrative actions, as well as district court cases to which the California Agencies were not parties.

Therefore, if the claims of the United States and the Tribes are to go forward, there must first be a final boundary determination of the disputed boundaries.

C. This Court, Under the Circumstances Presented in This Case, Is an Appropriate Forum to Determine the Boundary Issues, Through Proceedings Before a Special Master.

As has been clearly demonstrated above and in the Exceptions' Brief filed by the State Parties, the boundaries of the reservations have not been finally determined. Thus, the

motion by the United States and the Tribes for modification of the decree is premature for a crucial element of their claim has not been met.

Recognizing then that such claims are premature, the State Parties have nevertheless urged that the Tribes' *Winters* rights be finally determined here.[8]

The Special Master, however, erroneously reasons that this Court is an inappropriate forum in which to try the boundary issues premised upon two assumptions — that the Court in its 1964 decree contemplated that such a determination would be made elsewhere, and that this is a collateral proceeding in which surveys conducted by the Department of the Interior are conclusive. (1982 Report, pp. 66; 68-69.) That both assertions are incorrect will be demonstrated below.

The Special Master first reasons that the Court's rejection of the former Master's boundary determinations as "unnecessary" to be determined "here" ". . . indicates that it was adequate to do so elsewhere." (1982 Report, p. 66.) The California Agencies agree that the Court contemplated that such a determination could indeed have been made elsewhere, but the language of the Court does not preclude the possibility that such an action might also be brought in the Supreme Court.[9] Moreover, the difficulty in the prior proceeding with the failure to join interested land claimants would be ameliorated here if the Agencies' suggestion to join such parties is accepted.[10] Even if such private indi-

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[8]Response of the States of Arizona, California, and Nevada and the other California Defendants to the Motion of the United States for Modification of Decree, February 14, 1979, pp. 22-25.

[9]The Special Master concedes this possibility as to title disputes. (1982 Report, p. 66.)

[10]Memorandum of the Urban Agencies re the Indian Reservation Boundary Question, April 12, 1979, p. 2.

viduals are not joined, it is clear that a determination as to the boundaries for water allocation purposes could be made, as that is what occurred in the prior proceeding. *Arizona v. California, supra,* 373 U.S. 601.

If no determination of the boundary issues is made by this Court now, no additional water allocations may be made, for a crucial element of the claimants' claim will not have been established.

Additionally, it should be noted that the California Agencies do not quarrel with the proposition that a party claiming title to land, but refused water, might bring an action encompassing the boundary question. (1982 Report, pp. 66-67.) However, the California Agencies would still not be bound by such a determination unless they were parties to those actions; thus there would still be no final determinations of the boundaries and the provision for such actions does not preclude the determination of the issues by the Supreme Court.

Moreover, the assertion by the Special Master that no boundary determination may be made because boundaries fixed by surveys of public lands by the Secretary of the Interior are conclusive in collateral proceedings is erroneous.

First, it must be noted that such a rule, even if viable in this case, could not apply to the Fort Yuma Reservation, since what was involved there was not a survey question, but the authority of the Secretary of the Interior to in effect determine that an agreement, ratified by Congress, is null and void.

Secondly, the cases[11] relied upon by the Special Master did not involve the validity of boundaries upon which in-

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[11] *Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U.S. 10, 16-17 (1935); *Stoneroad v. Stoneroad,* 158 U.S. 240, 250-252 (1895); *Russell v. Maxwell Land Grant Co.,* 158 U.S. 253 (1895); *Knight v. United States Land Association,* 142 U.S. 161, 176-178 (1891); *Cragin v. Powell,* 128 U.S. 691, 698-699 (1888).

valuable water rights turned. Rather, those cases involved claims between parties to lands dependent in part upon federal surveys. Thus, to allow the United States to insulate such orders from review would be contrary to due process principles. Indeed, the unilateral determination by the United States of the very issue in the case was disapproved in *United States v. State of Louisiana*, 229 F.Supp. 14 (Lafayette Division 1964).

Finally, the Special Master attempts to answer the California Agencies' arguments that they have been denied their day in court by suggesting they might bring an action challenging Secretarial orders pursuant to the Administrative Procedure Act. (1982 Report, pp. 72-73.) Such a suggestion does not eliminate elements of the plaintiffs' claims which must be proved. That boundaries might be the subject of an action elsewhere does not mean that they need not be first established before an additional water allocation may be made.

Moreover, it is uncertain that such a determination could in fact be made elsewhere, since the United States and the Secretary have taken the position in a motion to dismiss, filed in an action brought by The Metropolitan Water District of Southern California and the Coachella Valley Water District[12] to determine these boundary disputes, that the plaintiffs do not have standing, and that the United States is immune.

Thus, if this Court is not an appropriate forum, there may be no forum available. Invaluable water rights could never then be fully and fairly adjudicated.

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[12]Civ. Action No. 81-0678-GT(M) filed in the Federal District Court for the Southern District of California. Copies of the Amended Complaint, United States' Motion to Dismiss, and the Order of the District Court are being lodged with the Court. We request this Court take judicial notice of these pleadings pursuant to Federal Rule of Evidence 201.

In light of the foregoing, it is apparent that in order to establish their *Winters* rights, the claimants here must establish that the lands are within the reservations; absent such a determination, no modification can be made. Further, it is clear that this Court is an appropriate, indeed, perhaps the only forum in which such claims might be resolved.

Finally, it should be noted that the Special Master's assertion that:

> "The various Secretarial Orders have defined the ambiguities or removed the inconsistencies which earlier caused uncertainty.
>
> . . . The disputes presented to the prior Master and the Court no longer exist." (1982 Report, p. 67.)

is clearly erroneous. Basic errors and inconsistencies respecting the disputed boundries remain and will be demonstrated below.

II.

THE PORTION OF THE WESTERLY BOUNDARY OF THE COLORADO RIVER INDIAN RESERVATION DESCRIBED AS "DOWN THE WEST BANK" OF THE COLORADO RIVER, IS THE BANK OF THAT RIVER AS IT NOW EXISTS SUBJECT TO THE USUAL RULES OF EROSION, ACCRETION AND AVULSION.

In the prior proceedings of this case before Special Master Rifkind (hereinafter the "Former Master"), the United States claimed that that portion of the westerly boundary of the Colorado River Indian Reservation which was described in the Executive Order amending the boundaries of the reservation as ". . . thence in a direct line toward the place of beginning to the west bank of the Colorado River; *thence down said west bank to a point opposite the place of beginning* . . ." meant the actual location of that west bank on the date of the Executive Order (May 15, 1876), and that the best evidence of that location was a survey of 1879 of the northerly portion and a survey of 1874 of the

southerly portion. The California Parties insisted that this description, under the usual legal rules applicable to river boundaries, meant the west bank *as it moved from time to time* subject to the rules of accretion, erosion and avulsion.

The former Master agreed with the California Parties and made findings and conclusions to this effect.[13] This Court ruled, however:

> "We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation. We hold that it is unnecessary to resolve these disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time." *Arizona v. California*, 373 U.S. at 601 (1963).

The 1964 decree (376 U.S. at 345) contained this reservation:

> ". . . provided that the quantities fixed in this paragraph and paragraph (4) [dealing with the Colorado River Indian Reservation] shall be subject to appropriate adjustment by agreement or decree of this court in the event that the boundaries of the respective reservations are finally determined"

The 1979 Supplemental Decree contained a similar reservation. (439 U.S. at 421.) As a consequence, with two exceptions, no water was allocated to the Colorado River Indian Reservation for lands claimed by the United States to be within the reservation westerly of the present location of the Colorado River in the area covered by the description in question.[14]

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[13]Report of the former Master, pp. 269-278.

[14]The two exceptions to this were an area of 2058 irrigable acres in the Olive Lake cutoff area and an area of 222 acres in the 9th Avenue cutoff area. (See Article IIA, Supplemental Decree, *Arizona v. California*, 439 U.S. 419, 428 (1979).) These two areas lie westerly of the present Colorado River and westerly of the 1874 meander survey, and were areas claimed to have been left stranded as a result of avulsive changes in the river in 1920 and 1942, respectively.

Subsequent to the Court's opinion, the Secretary of Interior, relying on an opinion of the Solicitor, on January 17, 1969, three days before he went out of office, issued an order directing that along approximately the northerly two-thirds of the disputed boundary, the meander surveys of 1879 and 1874 were to be considered the actual westerly boundary of the reservation.

In the present proceeding before the Special Master, the United States and the Indian Tribes have insisted that the westerly boundary in the area in dispute is the 1879-1874 survey location for the northerly two-thirds of the relevant boundary and the moving river boundary for the lower one-third, subject to the rules of accretion, erosion and avulsion.[15] The State Parties contended that this revised boundary claim was erroneous and demanded an opportunity to litigate the matter. The United States and the Indian Tribes contend the Secretary's orders are unassailable. The Special Master ruled that the Secretary's determination as to boundaries was sufficient for purposes of this case, accepting the boundary changes put forth in the motion of the United States filed on December 22, 1978 (1982 Report, p. 76), which included the Secretary's order of January 17, 1969, as to the Colorado River Indian Reservation.

We have elsewhere discussed the question of whether the State Parties are entitled to litigate the various unilateral boundary changes made by the different Secretaries of the Interior. (See, (Briefs in support of exceptions).) It is our intention here to argue that as a matter of law, the Secretary's order of January 17, 1969, relating to the westerly boundary

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[15]We have been, and continue to be baffled as to how the phrase "thence down said west bank" can mean one thing for the northerly twenty miles, and something else for the southerly ten miles of an undivided description or call. We shall discuss this further herein.

of the Colorado River Indian Reservation is wrong, and that the Court ultimately should decide and enter an order that in the relevant portion of the reservation, the westerly boundary is the west bank of the Colorado River subject to the usual rules of accretion, erosion and avulsion, and not the location of the west bank on May 15, 1876.

A. Background.

The following facts are taken from exhibits presented to the former Master by the United States in the prior proceedings, and are undisputed:

1. The Colorado River Indian Reservation was created by the Act of March 3, 1865 (13 Stat. 541, 559), which set apart approximately 75,000 acres in the then territory of Arizona for an Indian reservation. (Prior U.S. Exhibit 501.)

2. An Executive Order of November 27, 1873, added adjoining bottom lands in the territory of Arizona to the reservation, thereby bounding the reservation by the Colorado River on the west. (Prior U.S. Exhibit 503.)

3. An Executive Order of November 16, 1874, extended and redescribed the reservation to include lands on the westerly or California side of the Colorado River. (Prior U.S. Exhibit 504.) This order had a final call in California of ". . . thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a southeasterly direction to the point of beginning . . . ."

4. This straight line from the top of Riverside Mountain, California, to the point of beginning (where La Paz Arroyo enters the Colorado River, four miles above Ehrenberg, Territory of Arizona) resulted in leaving some land between the reservation boundary and the Colorado River on the Arizona side. The Indian agent for the Colorado River Indians called this to the attention of the Commissioner of Indian Affairs, noting that a direct line call ". . . cuts off

a large tract of very valuable land upon the east side of the River, and gives a very strong foothold to a certain class of men that desire to be in close proximity to the Indians, for unlawful and improper purposes." (Prior U.S. Exhibit 505a.) The Commissioner of Indian Affairs and the Secretary of Interior approved the recommendation for a boundary change. (Prior U.S. Exhibit 505b, 505c.)

5. An Executive Order of May 15, 1876, made the requested correction, and the pertinent description read as follows, as it does today:[16]

> ". . thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning [still at a point where La Paz Arroyo enters the Colorado River, four miles above Ehrenberg]."

6. No direct survey was made of the west bank of the Colorado River in the 30 miles in question at any time near 1876. In 1873, a contract had been entered into between the Surveyor-General and one Oliver P. Callaway, to survey four townships on the California side of the Colorado River. (Prior U.S. Exhibit 576.) This was done in 1874 (Prior U.S. Exhibit 576a) and resulted in part in the depiction of the west bank of the Colorado River as it bounded the four surveyed townships. Roughly one-half of that meandered line of 1874 (known as the "Callaway Line") is in the area of the Colorado River Indian Reservation and the other half lies southerly thereof. (See, Prior U.S. Exhibits 579b and 579c.)

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[16]An additional change made by Executive Order of November 22, 1915, (Prior U.S. Exhibit 506) affected lands in Arizona only.

7. In 1878, the Surveyor-General of the United States entered into a contract with one W. E. Benson, to survey some 18 townships in California. (Prior U.S. Exhibit 578.) This was accomplished in 1879 (Prior U.S. Exhibit 578a), and in part Benson meandered the west bank of the Colorado River northerly of the Callaway line. A portion of the "Benson line" is in the area of that portion of the Colorado River Indian Reservation in dispute here. (See, Prior U.S. Exhibits 579a and 579b.)

8. The United States Bureau of Land Management in 1958 made a dependent resurvey of the meander lines of that portion of the Callaway and Benson surveys relating to the 1876 call in question. (Prior Tr. pp. 20,010-20,022; Prior U.S. Exhibits 593a-f.) That portion of both those meander lines which affects this boundary dispute, is depicted on Prior U.S. Exhibits 579a, 579b and 579c. At two places (Section 18, T.5S, R.24E, S.B.M.; and S.13, T.6S, R.23E. S.B.M.) that line crosses the present location of the Colorado River and traverses land located in Arizona. (Prior U.S. Exhibit 579c; See also depiction of meander surveys on Prior U.S. Exhibit 562a.)

B. The Call "Down the West Bank" Designated a Moving Boundary.

The question of what is the meaning of the call "thence down said west bank [of the Colorado River]" is easy of resolution. This Court on numerous occasions has answered the question, holding that barring special circumstances, when a river is made a boundary, that boundary moves as the river moves, subject to the rules of accretion, erosion and avulsion.

> "The states are not in dispute about the applicable law. They agree that when changes take place by the slow and gradual process of accretion the boundary

> moves with the shifting in the main channel's course. Likewise, they agree that a sudden or avulsive change in that course does not move the boundary but leaves it where the channel formerly had run." *Kansas v. Missouri*, 322 U.S. 213, 215 (1944). See also *Arkansas v. Tennessee*, 397 U.S. 88 (1970); *Arkansas v. Tennessee*, 246 U.S. 158, 171 (1918); *Missouri v. Nebraska*, 196 U.S. 23, 35 (1904); *Nebraska v. Iowa*, 143 U.S. 359, 361-67 (1892); *County of St. Clair v. Lovingston*, 90 U.S. (23 Wall.) 46, 68 (1874).

This rule applies whether the boundary is the "thalweg" or middle of the main channel, as in most of the cases cited above, or is one side or the other of the river, such as the low-water mark on the north side of the Ohio River. (*Indiana v. Kentucky*, 136 U.S. 479, 508 (1890)[17] And indeed, this rule obtains when the boundary is a particular bank of a river. In *Howard v. Ingersoll*, 54 U.S. (13 How.) 380 (1851), this court ruled that the boundary between Georgia and Alabama along the Chattahoochee River was, by the language of a territorial cession by Georgia, the western bank of the River. Nine years later in *Alabama v. Georgia*, 64 U.S. (23 How.) 505, 515 (1860), the court again dealt with the western boundary of Georgia along the Chattahoochee River, and described it thusly:

> "We also agree and decide that this language implies that there is ownership of soil and jurisdiction in Georgia in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an

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[17]In *Ohio v. Kentucky*, 444 U.S. 335, 337-38 (1980), this Court held that because of the historical factors and special circumstances connected with the cession by Virginia of the land north of the Ohio River in 1783, the low-water mark as it existed on June 1, 1792, when Kentucky became a state, was the permanent boundary irrespective of future changes in the course of the river.

> increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn."
>
> See also *Packer v. Bird*, 137 U.S. 661, 663, 671-73 (1891).

The court undoubtedly contemplated a moving boundary, not the bank as it existed at the time of the act of cession by Georgia in 1802, or the date of statehood of Alabama in 1817, where otherwise the river would neither always remain in Georgia as intended, nor constitute its western boundary.

The court also dealt with a bank of a river, the southern bank of the Red River in *Oklahoma v. Texas*, 260 U.S. 606, 636 (1923), and here unequivocally held that the boundary is a moving one, subject to the rule of accretion, erosion and avulsion. (This particular boundary was first described in the treaty of 1819 between Spain and the United States.)

> "Our conclusion is that the cut bank along the southerly side of the sand bed constitutes the south bank of the river, and that the boundary is on and along that bank at the mean level of the water when it washes the bank without overflowing it.
>
> The boundary as it was in 1821, when the treaty became effective, is the boundary of to-day, subject to the right application of the doctrines of erosion and accretion and of avulsion to any intervening changes. Of those doctrines this court recently said:
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> 'It is settled beyond the possibility of dispute that where running streams are the boundaries between states, the same rule applies as between private proprietors; namely, that when the bed and channel are changed by the natural and gradual processes known

> as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel.' *Arkansas v. Tennessee*, 246 U.S. 158, 173, 62 L. ed. 638, 647, L.R.A. 1918D, 258, 38 Sup. Ct. Rep. 301."

It must be concluded that the call to the west bank of the Colorado River in the Executive Order of May 15, 1876, was intended to delineate the western side of the river on the bank with the same meaning as defined by this court in *Oklahoma v. Texas, supra*. Indeed, the Solicitor in his 1969 opinion supporting the Secretary' order, concedes this:

> "From the point where the line from Riverside Mountain intersects the bank of the river, as described above, the second segment of the boundary should follow downstream along the bank of the river at the line of ordinary high water as it existed at the time of the issuance of the Executive Order of May 15, 1876, to the south boundary of section 12, T. 5 S., R. 23 E., S.B.M., subject to the application of the doctrine of erosion and accretion and avulsion to any intervening changes. *Oklahoma v. Texas, supra*.
>
> With regard to such intervening changes, when the banks of a river change gradually and imperceptibly, the process is called erosion and accretion and a riparian owner's boundary will remain the stream. In cases where a river suddenly abandons its old bed and seeks a new course, the change is termed an avulsion and a riparian owner's boundary will become fixed and permanent along the line of the former channel. *Ne-*

braska v. Iowa, 143 U.S. 359 (1892)." Opinion of Solicitor, January 17, 1969, p. 5.[18]

There are no special circumstances or historical factors that would lead to a different result such as the court found in *Ohio v. Kentucky, supra*, (444 U.S. 335). Indeed, the record shows to the contrary. The purpose of the 1876 Executive Order was to make the river the boundary and exclude settlers on the Arizona side, or as the Indian agent described them, ". . . a certain class of men that desire to be in close proximity to the Indians, for unlawful and improper reasons [read: liquor traders]." The 1873 amendment to the boundary had made the river the boundary, adding the bottom lands to the Reservation. The 1874 change had inadvertently cut off some of this area, leaving non-reservation lands between the Reservation and the river. The 1876 Executive Order was intended to correct this. This of necessity contemplated a moving boundary.

The Secretary's order would defeat that purpose. As the river meandered easterly, it would, as it has done, leave accretion lands in California, and under the Secretary's Order, leave no river barrier between the Indians and the undesirable settlers on this land, which could only be reached by crossing the river. Similarly, as the river mean-

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[18]We do not wish to be understood by agreeing that the western boundary of the Colorado River Indian Reservation in this particular area is the western bank of the river, that the bed of the river itself is within the Reservation. This stretch of the Colorado River is navigable (*Arizona v. California*, 283 U.S. 423 (1931)), and thus ownership of the bed of the western half has been in the State of California since its admission in 1850, well before the creation of the Colorado River Indian Reservation. (*Pollard v. Hagen*, 44 U.S. (3 How.) 212 (1845); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423 (1867). Arizona became a state (1912) after the creation of the Reservation. It is our contention, however, that under the doctrine of *Montana v. United States*, 450 U.S. 544 (1981), ownership of the bed of the eastern half of the Colorado River also passed to Arizona. This issue is being litigated before the 9th Circuit currently. (*United States v. Aranson*, 9th Cir. No. 77-2295.)

ders westward, as it has done in the southern portion of the area in question, there would be non-reservation lands between the river and the reservation on the Arizona side, the very circumstance which led to the 1876 Executive Order in the first place. Thus, it must be concluded that the only circumstance surrounding this Order support the application of the usual rules as to river boundaries, and the 1876 Executive Order created a moving boundary.

C. The Solicitor's Reasoning as to Why the Line Was Fixed Permanently as of 1876 Has No Legal Support.

The Solicitor's opinion of January 17, 1969 on which the Secretary based his boundary order of the same date, contains two parts. The first deals with the call from the top of Riverside Mountain, California, to the west bank of the Colorado River.[19] The opinion concludes that the west bank "". . . must be taken to mean the line of ordinary high water as it existed in 1876;" citing *Oklahoma v. Texas, supra*. We agree that the "west bank" call in the Executive Order is to the ordinary high water line, and that case is ample support of that proposition.

It is the second part of the opinion with which we take exception, that the intent of President Grant on May 15, 1876, was to freeze that west bank line as of that date. The Solicitor's Opinion correctly cites *Nebraska v. Iowa, supra* (143 U.S. 259), for the proposition that river boundaries move as the river gradually and imperceptibly adds accretion to one side and erodes the other, while in the event of an

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[19]The Department of Interior, was, as of 1969, concerned that the point which everyone previously thought was the highest point on Riverside Mountain was, in fact, not so, and that the actual highest point was located approximately 500 feet to the west. We are not challenging this change of location of the top of Riverside Mountain.

avulsion, the boundary line will become fixed along the line of the former channel. The Solicitor's Opinion also correctly recognizes that the west half of the bed of the Colorado River, being navigable at the point in question, is owned by the state of California in its sovereign capacity. (*Pollard's Lessee v. Hagan, supra* (44 U.S. 3 How. 212); *Mumford v. Wardwell, supra* (73 U.S. (6 Wall.) 423, 436.)

The Opinion then points out that each state, as owner of the land beneath navigable waters, may choose by its own law whether to claim the high water line, the ordinary low water line, or the center of the stream. (*Barney v. Keokuk*, 94 U.S. 324, 338 (1877); *Packer v. Bird, supra.*) California has chosen by Section 830 of the Civil Code, to claim only to the low-water mark. On the surface, this would appear to leave the adjoining upland owner owning down to the low water line along navigable waters in California. Since, the Opinion concludes, the United States was the only owner of lands abutting the west bank of the Colorado River in the area in question, the United States in 1876 owned to the low water mark. The Opinion then concludes with this astounding and unsupported statement:

> "In issuing the Executive Order of May 15, 1876, the United States effectively severed that portion of the lands between the high and low-water marks by including them in the reservation, thus, effectively segregating these lands from public lands lying to the west thereof. It must be concluded that the Executive Order was effective to reserve any lands within the river then

owned by the United States as such order clearly intended that the river be included in the reservation."[20]

The conclusion that the 1876 line was a fixed, permanent boundary, has many flaws. First, it is directly contrary to the purpose for which the river was chosen as boundary, as shown by the evidence produced by the United States. The river was to be a buffer between the Reservation and the undesirable white settlers. If this boundary is fixed by the bank as of a particular time, as soon as the river moves, and it did with regularity before being controlled by the dams in this century, this purpose would be thwarted each time the river moves. Only a moving boundary would keep the desired barrier in being.

Secondly, this severance theory would prevent future purchasers or settlers of the adjoining uplands on the west bank, which were part of the public domain, from obtaining the benefits of the rules of accretion and erosion. There is no evidence that the President intended this in 1876. Moreover, the theory requires a conclusion, belied by physics and hydrology, that as the low water line moves, the high

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[20]This theory of a severing of the area between high and low water along the west bank of the Colorado River resulting in the freezing of the reservation boundary along the high water line was not advanced in the proceedings before the former Master. There the United States advanced the theory that the call of "down said west bank" fixed the "reservation boundary on the relatively permanent acclivity separating the bed of the river from the adjacent upland." (Brief in Support of Findings of Fact and Conclusions of Law Proposed by the United States of America, April-June 1959, pp. 31-35.) The Government cited and quoted *Oklahoma v. Texas, supra*, but failed to recognize the rule in that case that a boundary described as a bank denotes a moving boundary. (260 U.S. at 636.) At least the Solicitor's Opinion recognizes this rule, but attempts to evade it by creating a new high-low water zone severance theory. Further, before special Master Rifkind, the United States claimed that the boundary was fixed along the 1876 line (as evidenced by the 1879 and 1874 surveys) throughout its entire length from the interception of the west bank by a line from the top of Riverside Mountain to a point opposite the point of beginning. Here, the Solicitor decided to stop two-thirds of the way down.

water line remains intact where it was in 1876. This is simply not so. As the process of accretion and erosion takes place, both the high water line, that is the line which "... confines the water ... when they reach and wash the bank without overflowing it" (*Oklahoma v. Texas, supra*, 260 U.S. at 632), and the low water line, that is the line which is always under water (*Alabama v. Georgia, supra*, 64 U.S. at 515), also moves, not necessarily in parallel, depending on the topography. The new accretion is to the uplands and belongs to the uplands. (*County of St. Clair v. Lovingston, supra*, 90 U.S. (23 Wall.) 46, 69.)

The Solicitor's Opinion also misreads California law on its low water claim. While it is true that California Civil Code section 830 constitutes a grant by the state to the adjoining upland owner of the land to the beds of navigable non-title bodies to the low water mark, that grant is not absolute. As the California Supreme Court recently held in *California v. Superior Court (Lyon)*, 29 Cal.3d 210 (1981), and *California v. Superior Court (Fogerty)*, 29 Cal.3d 240 (1981), that grant is subject to the public trust reserved in the state to use the lands between low and high water, and this trust includes the use of such lands by the public for commerce, navigation, and fishing, as well as recreation uses and the right to preserve the tidelands in their natural state. (29 Cal.3d at 230-32.) The existence of this public trust, and its possible exercise by the state or its citizens, is inconsistent with any exclusive use of Indian reservations, and belies any intent to sever the zone from the adjoining uplands.

Finally, we must comment on the hypocrisy of the United States claiming this fixed boundary for only two-thirds of the call. The call itself is undivided, being "thence down said west bank to the point opposite the place of beginning." Yet the United States, before Special Master Tuttle, now

claims that this call means that the west bank is fixed in 1876 from the beginning of the call (at the point the line from Riverside Mountain intercepts the River) southerly through Section 12, T.5S, R.23E S.B.M. At that point the line goes due east to the present river and follows the west bank of the present river to the southerly boundary, subject to the rules of accretion, erosion and avulsion. No legal theory is advanced anywhere by the United States as to why the line is fixed along the northerly two-thirds of the call, but is a moving boundary along the southerly one-third. It is readily apparent as to why the United States would want to make this claim, legally supportable or not. A glance at Prior U.S. Exhibit 579C, shows that the 1876 line, as evidenced by the 1879 and 1874 surveys, crosses the Colorado River as it exists today in the southerly third, and if that were the boundary, the Indian Reservation would lose thousands of acres of land, much of it practicably irrigable. Thus, the United States is attempting a classic case of having one's cake and eating it at the same time. The law, however, does not support the United States in this endeavor, and no amount of wishful thinking will change the undivided call of the Executive Order, nor alter its original purpose.

The United States has attempted to avoid having a judicial determination made of the westerly boundary of the Colorado River Indian Reservation. It is unconscionable for the United States to set a boundary arbitrarily and unilaterally and then demand water rights based on those boundaries at the expense of parties who have contracts for water from that very government.

The foregoing discussion clearly indicates that no final determination of the boundary has yet been made. The California Agencies respectfully urge this Court to remand this boundary dispute for a final determination with the partic-

ipation of the California Agencies or indeed, given the clear legal authority presented, this Court might rule on the boundary of the Colorado River Indian Reservation as a matter of law. The Court should decline to award any additional water, until the reservation boundaries have been finally determined.

III.

THE 1978 SOLICITOR'S OPINION PURPORTING TO VOID AN 1893 AGREEMENT BETWEEN THE UNITED STATES AND THE QUECHAN TRIBE AND TO RESTORE SOME 25,000 ACRES OF LAND TO THE FORT YUMA INDIAN RESERVATION IS IN ERROR.

This dispute involves the question of whether some 25,000 acres of land in the vicinity of the Fort Yuma Indian Reservation in California ("disputed lands") should be deemed to be part of the Fort Yuma Indian Reservation and the diversion rights of those acres.[21] No claim was made for those lands in the original proceeding, presumably because a 1936 Solicitor's Opinion (the "Margold Opinion")[22] had determined that such lands were *not* part of the reservation.

Subsequent to this Court's 1963 decision, the boundary issue came before the Solicitor again in 1968 and was later raised by the Fort Yuma Tribes before the Secretary in 1975. In each instance Solicitor Weinberg[23] and Austin[24] affirmed the Margold Opinion. On December 20, 1978, with no prior notice to interested parties,[25] the Solicitor issued a new opinion (the "Krulitz Opinion") overruling the three earlier Solicitors' opinions and ignoring two district court decisions. (86 I.D. 3.) It is that opinion which the United States, the Tribes and the Special Master contend constitutes a "final determination" of the Fort Yuma boundary insulated

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[21]1982 Report, p. 254.

[22]Solicitor's Opinion M-28198 (January 8, 1936). A copy of this Opinion is being lodged with the Court. We request this Court take judicial notice of said opinion pursuant to Federal Rule of Evidence 201.

[23]Memorandum from the Solicitor to the Secretary of the Interior dated June 12, 1968. A copy of this opinion is being lodged with the Court. We request this Court take judicial notice of said opinion pursuant to Federal Rule of Evidence 201.

[24]Solicitor's Opinion M-36886 (January 18, 1977), 84 I.D. 1 (1977).

[25]The interested officials of California and Arizona, along with representatives of the Quechan Tribe, participated fully in the proceedings leading to the Austin Opinion.

from review by the States California Agencies in this proceeding. (1982 Report, pp. 56-57, 62-63.)

A. Background.[26]

By executive order of January 9, 1884,[27] President Arthur established the Fort Yuma Indian Reservation in California for the Yuma (now called Quechan) Indians. The reservation had two distinct areas — a harsh desert mesa and a relatively fertile area along the flood plain of the Colorado River. In the early 1890s non-Indian farmers moved into the region adjacent to the reservation and began practicing irrigated farming. Several companies planned to construct irrigation canals in the area and were granted rights-of-way across federal lands by legislation enacted in 1893 which required the companies to serve the occupants of the Yuma Reservation.[28] In that same year the Quechans petitioned the President and Congress to have their lands irrigated and offered to cede their rights in the reservation to the United States for settlement by non-Indians in return for individual allotments of irrigable land.[29]

By the Act of March 3, 1893, Congress had authorized the Secretary of the Interior "to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress."[30] Pursuant to that authority, and in response to the Tribe's petition, the Secretary appointed a three-man Commission which negotiated an agreement

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[26]Most of this background material is summarized from the Austin Opinion.

[27]Kappler, *Indian Affairs — Laws and Treaties* (1904), p. 832.

[28]Act of January 20, 1893, 27 Stat. 420; Act of February 15, 1893, 27 Stat. 456.

[29]S. Exec. Doc. No. 68, 53rd Cong., 2d Sess. 14-16 (1894).

[30]27 Stat. 612, 633.

with the Tribe on December 4, 1893 (hereafter the "1893 Agreement").[31]

The 1893 Agreement can be summarized as follows. By Article I the Quechans, "upon the conditions hereinafter expressed," relinquished all their right, title, claim or interest in the Yuma Reservation. Article II provided for the allotment of five acres to each individual Indian. Article III provided for the selection of allotments and the disposition of the residue of the reservation which was subject to irrigation. The unalloted irrigable lands were to be surveyed and subdivided into 10-acre tracts. The tracts were to be appraised subject to the approval of the Secretary of the Interior and sold at public sale for not less than the appraised value. After a second public offering, the Secretary of the Interior was empowered to sell the tracts at private sale for not less than the appraised value. Article IV provided that the proceeds from such sales would be placed in the Treasury to the credit of the Quechans with interest at five percent per annum, subject to appropriation by Congress or application by the President for the payment of water rents, the building of levees, irrigation ditches and laterals, the construction and repair of buildings, the purchase of tools, farm implements and seeds, and the education of the Quechans. Article V authorized the Secretary to issue 25-year trust patents to the allottees. Article VI provided that all lands not subject to irrigation were to be opened to settlement under the general land laws. Article VII excepted from the operation of the agreement a tract of land, with buildings, to be used as an Indian school.

The 1893 Agreement was "accepted, ratified and confirmed" by Congress in Section 17 of the Act of August

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[31]S. Exec. Doc. No. 68, *supra*, n. 9 at 3, 19-22.

15, 1894, 28 Stat. 286, 335 (1894) (the "1894 Act"). It also required the Colorado River Irrigation Company, to which a right-of-way had been granted the previous year, to begin construction of a canal within three years or forfeit the right-of-way. It is clear that this canal was intended to be the vehicle by which water would be brought to the irrigable Indian lands. The Act also provided that "all of the lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain, and shall be opened to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws."

The private canal company never constructed the proposed canal. However, with the enactment of the Reclamation Act of 1902,[32] the Secretary proposed that the benefits of that Act be extended to the Quechan lands. Congress responded in the Indian Appropriations Act of 1904, 33 Stat. 189, 224 (the "1904 Act"), which authorized the Secretary to serve the Quechan irrigable lands in connection with any reclamation project for that area and revised the financial terms under which the Quechans were to receive water and under which unallocated irrigable lands were to be sold. While the earlier financial terms were more favorable to the Quechans, it is uncertain whether the 1904 Act, as actually administered, may have been to their advantage. In 1911, Congress increased the allotment to individual Indians from 5 to 10 acres. 36 Stat. 1059, 1063.

Initial diversion and distribution works were completed by 1904 and water delivered to the unallotted irrigable lands in 1910. Disposal of those lands began in that year. In 1912, 8,110 acres in the western part of the irrigable area were

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[32]32 Stat. 388, as amended, 43 U.S.C. § 371 et seq.

allotted to the Quechans. The distribution system for that area was substantially completed by 1915 and water deliveries began a few years later. The non-irrigable lands have never been opened to settlement and sale as provided in the 1894 Act.

The administrative treatment of the lands within the Department of the Interior from 1894 until the early 1930s evidenced uncertainty and confusion over whether the non-irrigable lands were Indian lands or public domain lands. As a result of a dispute over their status between the Bureau of Reclamation and the Bureau of Indian Affairs in 1935 in connection with construction of the All-American Canal across those lands, the Secretary of the Interior requested an opinion on the matter from Solicitor Nathan Margold. On January 8, 1936, Solicitor Margold held that the 1893 Agreement, as ratified by the 1894 Act, extinguished the Quechan's title to the non-irrigable lands of the 1884 reservation.

In the earlier proceedings in *Arizona v. California*, 373 U.S. 546 (1963), no issue was raised as to the proper boundary of the Fort Yuma Indian Reservation, and the United States asserted no water rights claim for the dispute area. In 1968, Solicitor Weinberg reaffirmed the Margold Opinion in approving a lease of some of the lands by the Bureau of Land Management.

In the early 1950s, the Quechans presented a number of claims before the Indian Claims Commission and the Court of Claims for compensation or other relief in connection with the disputed cession. The Tribe filed a motion to dismiss their claim without prejudice in 1972, but the United States objected to the dismissal being granted without prejudice. The motion has not been pursued and the matter is still pending before the Court of Claims. (Indian Claims Commission Docket No. 320.)

In 1973 review of the matter was undertaken by the Secretary of the Interior at the request of the Tribe. A draft opinion favorable to the Quechans was prepared by the Indian Affairs Division of the Solicitor's office and subjected to extensive review, briefing and oral argument by both Indian and non-Indian interests. On the basis of that review, Solicitor Austin concluded that he could not accept the draft opinion and reaffirmed the Margold Opinion on January 30, 1976. A lengthy formal opinion to that effect was later issued. 84 I.D. 1 (1977).

When the Carter Administration took office in January 1977, Secretary Andrus agreed to have Solicitor Krulitz review the matter. Contrary to Solicitor Krulitz's assurances that he would involve interested parties in his review, they were neither apprised of the progress of that review nor invited to participate. On December 20, 1978, Solicitor Krulitz issued an opinion overruling the earlier Margold, Weinberg and Austin opinions. He concluded that the 1893 agreement was a conditional cession of the Quechans' non-irrigable acreage which was never effected because the specific conditions of the agreement had not been complied with. 86 I.D. at 4-5. The following day the United States filed its present claims for additional water for the Fort Yuma disputed lands in this proceeding.[33]

B. The Issues.

The basic issues in the controversy are:

1. Whether the 1893 Agreement effected an immediate cession of the Quechans' lands to the United States in return for a promise by the United States to perform certain acts,

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[33]Motion of the United States for Modification of Decree (December 21, 1978).

or whether the obligations assumed by the United States were conditions precedent to the cession;

2. If the cession is construed as conditional, whether the reclamation and other benefits provided the Quechans under the 1904 Act were designed to implement the 1893 Agreement and substantially satisfied those conditions, or whether the 1904 program completely superseded the 1893 Agreement and left the non-irrigable lands in Tribal ownership.

C. Argument.

The Krulitz Opinion justifies overruling the three previous Solicitors' opinions and ignores two relevant district court decisions primarily on the following rationale (86 I.D. at 6).

> The conclusions of this opinion flow from premises which differ from those in the 1936 and 1977 opinions in two fundamental respects: (a) a finding that the documents, rather than being clear, contain ambiguities in critical areas; and (b) canons of construction applied here with are uniquely applicable to controversies involving Indian rights as opposed to those which may apply to controversies generally.

The California Agencies contend that the Austin Opinion properly found no ambiguities in the relevant documents and appropriately recognized the canons of construction applicable to Indian disputes in construing them. The Krulitz Opinion, on the other hand, unfortunately failed to heed this Court's explanation in *Shoshone Indians v. United States*[34] that the decisions on this point:

> ". . . meant no more than that the language should be construed in accordance with the tenor of the treaty.

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[34]324 U.S. 335, 353 (1945).

> That, we think, is the rule which this Court has applied consistently to Indian treaties. We attempt to determine what the parties ment [*sic*] by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress."

1. The Basic Premise of the Krulitz Opinion Is Erroneous.

The 1893 Agreement reflected basic national Indian policy of that period. That policy was designed to reduce the size of Indian reservations, break down the pattern of communal tribal ownership and direct individual Indians into agricultural pursuits in the manner of the non-Indian community. To that end it embodied a basic approach involving "allotments" of subsistence-size parcels of tribal reservation lands to individual tribal members. Unallotted lands were to be opened to settlement and for sale and the proceeds devoted to the Indians' benefit. The integration of non-Indian settlers with the Indian allottees was intended not only to promote western development but to foster a "civilizing" process among the Indians.[35]

The 1893 Agreement generally followed the basic pattern described above. On its face it is a simple unilateral contract under which the Quechans' carry out the proposed arrangement, *i.e.*, immediate cession of all their tribal reservation lands to the United States, in return for a promise by the United States to allot five-acre parcels to individual members of the tribe and to sell surplus irrigable acres to non-Indian settlers and devote the proceeds to the Indians' benefit. The remaining nonirrigable portion of the reservation ceded to the United States was to be opened to settlement and entry under the general public land laws.

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[35]See generally, Price, *Law and the American Indian*, 531-51 (1973).

Given the water supply situation on the reservation and the desires of the Quechans as reflected in the negotiations leading up to the 1893 Agreement, the California Agencies concede that it may reasonably be concluded that, in addition to the express "terms and conditions" of the agreement, a promise on the part of the United States to provide irrigation for the allotted lands may properly be implied. That implied promise is strengthened by the provisions of the 1894 Act ratifying the 1893 agreement, which contemplated irrigation of the ceded lands from a proposed canal planned for construction across the reservation by the Colorado River Irrigating Company.

The fatal defect in the Krulitz Opinion, however, and which is the keystone of its argument, is that, relying on nothing more than its own *ipse dixit*, it converts the United States' implied promise of irrigation into a "condition precedent" to the effectiveness of the otherwise unqualified present cession of the Quechan lands to the United States. Although the United States did eventually provide irrigation to the Quechan lands as promised, it did so as part of the Federal reclamation program rather than by means of the private canal company. The Krulitz Opinion refuses to recognize this as substantial performance of the United States' obligation and transforms a possible Quechan claim for damages against the United States for failing to provide irrigation precisely in the manner and within the time frame contemplated by the 1893 Agreement into a strained, legalistic argument that completely voids that agreement. That construction of the agreement flies in the face of its plain language, its basic purpose and the then prevailing national Indian policy. Moreover, its Procrustean interpretation not only only escaped the Department of the Interior for three-quarters of a century but would overrule three prior carefully considered Solicitor's opinions on the same point, which

relied in part on prior judicial interpretation of the effect of the 1893 Agreement which is contrary to the Krulitz conclusions. Finally, it is in direct conflict with the representations made by the United States to this Court in the prior proceedings in this case with respect to the effect of that agreement as a basis for the decreed water rights of the Yuma Indian Reservation.

2. The 1893 Agreement, as Ratified by Congress in 1894, Embodied a Present Cession of All Quechan Lands to the United States in Return for a Promise by the United States to Make Allotments to Individual Indians, Provide Irrigation for Those Lands, Sell the Remaining Irrigable Acreage for the Quechans' Benefit, and Open the Ceded Non-irrigable Lands to Settlement.

Article I of the 1893 Agreement provides that the "Yuma Indians, upon the conditions hereinafter expressed, do *hereby surrender and relinquish* to the United States *all* their right, title, claim, and interest in and to and over" their tribal lands within their reservation (emphasis added). The language is clearly that of *present* cession of the tribal lands. The conditions "hereinafter expressed" are found in Articles II through V, providing for the allotment of five-acre parcels to individual Indians and the sale of surplus irrigable lands for the Indians' benefit, and Article VI, providing that all ceded lands that could not be irrigated were to be open to settlement under the general land laws of the United States. Although Article I refers to the obligations undertaken by the United States in return for the present cession as "conditions," it is clear that they are promises to perform certain acts in the future. In short, the 1893 agreement is a classic textbook example of a contract formed by the performance of an *act* by one party, here the Quechans' cession of their lands, in return for a *promise* by the other, here the United States' promise to make allotments, provide

irrigation for them, and sell surplus irrigable lands for the Indians' benefit.

Not only is the nature of the agreement clear from its terms, but to construe the United States' promise to perform *in the future* as a condition precedent to the clearly stated *present* cession renders the contemplated program impossible of performance. How could the United States make allotments to individual Indians, sell surplus irrigable lands to non-Indians, and open the non-irrigable lands to settlement by non-Indians under the public land laws unless it had *first* obtained full title to the Quechan tribal lands as Article I clearly contemplates? The Krulitz Opinion nowhere resolves this self-generated paradox.

The 1893 Agreement and related legislation must be viewed in the context of Federal Indian policy at that time. Throughout most of the 19th Century the United States had followed a policy of working out accommodations with the Indian Tribes on the basis of treaties by which the various Indian nations ceded to the United States vast expanses of their territory in return for settlement upon designated reservations. In the late 1800's, however, Congress decided to abandon its policy of segregating Indians from the mainstream of American life and instituted a policy designed to break up the tribal holdings by reducing the size of existing reservations and parcelling out sufficient land to individual Indians to make them self-supporting. Surplus lands were to be sold or opened for entry to non-Indian settlers to foster development.

The United States has executed numerous agreements with Indian tribes similar to that executed with the Quechans. However, the California Agencies have found no judicial decisions (and the Krulitz Opinion cites none) in which the promises made by the United States in return for the Indian land cessions necessary to carry out the national

program have been interpreted as "conditions precedent" to the effectiveness of those cessions. On the contrary, in *United States v. Myers*, 206 F. 387 (8th Cir. 1913), the court construed a similar agreement, executed only about a year earlier than the Quechan agreement, squarely consistent with the Austin Opinion. There the court had before it the act of June 6, 1900 ratifying an agreement between the United States and the Kiowa, Comanche and Apache tribes in Oklahoma. At issue was the effect of a tribal land cession to the United States in return for allotments of land to individual tribal members, the setting aside of certain grazing lands for the tribe's use, and the payment of $2 million. The effect of this agreement and the ratifying legislation was described as follows (206 F. at 389, 391-392, emphasis added):

> "The act of June 6, 1900, c. 813, 31 Stat. 676, was passed in ratification of an agreement between the United States and the Kiowa, Comanche, and Apache tribes of Indians in Oklahoma entered into October 21, 1892, whereby, in return for the allotment of land in severalty to the individual members of these tribes, and other good and valuable considerations specified, all these tribal lands, including that in question, were relinquished to the United States. The comprehensiveness of the grant made is disclosed by the following quotations from the act:
>
> '*Subject to* the allotment of land, in severalty to the individual members of the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory, as hereinafter provided for, and *subject to* the setting apart as grazing lands for said Indians, four hundred and eighty thousand acres of land as hereinafter provided for, and *subject to the conditions hereinafter imposed*, and for the considerations hereinafter mentioned, the said Comanche, Kiowa, and Apache Indians *hereby*

cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation whatever express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in the following described tract of country in the Indian Territory, to wit: [Here follows the specific description.]

* * *

'As a further and only additional consideration for the cession of territory and relinquishment of title, claim, and interest in and to the lands as aforesaid, the United States agrees to pay to the Comanche, Kiowa, and Apache tribes of Indians, in the Indian Territory, the sum of two million (2,000,000) dollars. * * *'

* * *

When the Kiowa, Comanche, and Apache tribes ceded this land to the United States, it ceased to be Indian country, unless by the treaty by which the Indians parted with their title, or by some act of authority, a different rule was made applicable to the case.

Was there any reservation, express or implied, incidental to the cession and relinquishment by these Indians by which their title to the lands in question was extinguished, that this or any other land conveyed should be devoted to these purposes? We can find none. The treaty of October 31, 1892, confirmed by act of Congress of June 6, 1900, specifies explicitly the *conditions* and considerations *subject to which* the conveyance and cession was made. They are the allotment of land in severalty, the setting apart of 480,000 acres of grazing land, and the payment of $2,000,000 in the manner provided. For these considerations the Indians 'ceded, conveyed, transferred, relinquished and surrendered forever and absolutely, without any reservation whatever, express or implied all their claim,

> title and interest of every kind and character.' It would be impossible to select words operating more completely to extinguish every vestige of Indian title, and releasing the government more absolutely from every obligation, moral as well as legal."

In accord with the foregoing is *Kickapoo Tribe of Kansas v. United States*, 372 F.2d 980 (1967), in which the Court of Claims construed a similar agreement with the Kickapoo Indians as effecting a cession of tribal lands in return for the United States' "contractual promise" to perform certain acts. *Id.* at 987.

The statutory agreement with the Quechans is from the same mold as the agreement with the tribes involved in the cited cases and should be similarly construed to have effected a cession of the tribal lands in 1894 in return for the United States' promise to perform the specified acts.

In cases where the "conditions" specifying the United States' obligations assumed in return for Indian cessions were not fully performed, or were performed (as here) in a manner somewhat different than originally agreed upon, this Court has viewed such actions by the United States as breaches of its obligations for which a claim for damages might lie.[36] We have found no cases in the vast body of Indian law (and the Krulitz Opinion again cites none) where a breach of a contract or trust obligation by the United States has been construed to void the initial cession of lands by the Indians, which is the extreme result the Krulitz Opinion purports to accomplish.

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[36]See, *e.g.*, *Peoria Tribe of Indians v. United States*,, 390 U.S. 468 (1968); *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913); *United States v. Blackfeather*, 155 U.S. 180 (1894).

3. The Irrrigation Program Under the 1904 Act Was Intended to Fulfill the United States' Obligations Under the 1893 Agreement.

The principal alleged "failure of consideration" on which the Krulitz Opinion relies to nullify the 1893 agreement is that the United States' implied promise to irrigate the Quechan lands incorporated a specific means of irrigation, namely through a canal proposed to be built by the Colorado River Irrigating Company. That project never materialized. Hence, Solicitor Krulitz argues that the later provision of the promised irrigation by means of the Reclamation Service formed in 1902 will not do. Just why this substituted performance is not adequate satisfaction of the Quechans' expectation is nowhere explained. Rather, the Krulitz Opinion concludes that the 1904 Act was "intended to create an entirely new scheme for the irrigation of the area under which there was no cession of "non-irrigable lands.' " (86 I.D. 18-19.) However, the background of the 1904 Act and its legislative history detailed in the Austin Opinion conclusively refutes that thesis. (84 I.D. 41-44.) The Austin view is that the 1904 Act did not wholly repeal the 1894 ratifying act, but only substituted a new method of performing the United States' obligation to irrigate. Indeed, the limited objective of the 1904 legislation, namely, to modify the manner in which the United States was to carry out its obligations assumed in the 1894 Act, is the most plausible explanation as to why no mention is made in the 1904 Act of the non-irrigable lands within the reservation boundary — Congress obviously assumed that the cession of all Quechan lands had already been effected 10 years earlier. Moreover the Reclamation Act of 1902, to which it related, was only concerned with irrigable lands.

The Margold-Weinberg-Austin opinions are more consistent with the judicial rule that treaties and other agree-

ments with the Indians should be construed in the simple fashion by which they were probably understood by them.[37] It is highly improbable that the Indians understood the 1893 Agreement in the hyper-legalistic fashion of the Krulitz Opinion. The Quechans wanted water for their lands, and the United States simply promised, by implication, to provide irrigation and it did so, although a few years later and in a fashion other than originally contemplated. Nevertheless, it is clear that the United States has substantially performed its agreement, and any deviation from the 1893 Agreement which may have damaged the Quechans in any way may be remedied by the Court of Claims, which is the appropriate, if not the only proper forum for this dispute.[38] Indeed the Quechans' claim was initially filed there and is still pending. The California Agencies believe that the Court should leave this matter to the tribunal provided by Congress for such disputes.

4. The Administrative Treatment of the Disputed Area Prior to 1936 Is Inconclusive and, in Any Event, Cannot Vary the Plain Language of the 1893 Agreement.

The Austin and Krulitz opinions differ over the significance to be given to administrative treatment of the disputed area by Departmental officials prior to the Margold Opinion

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[37]In *Gila River Pima-Maricopa Indian Community v. United States*, 467 F.2d 1351, 1355 (1972), the Court of Claims stated the long-standing rule as follows:

> "Possibly the vague and overblown language . . . could be interpreted in this fashion if the compact were between sophisticated commercial firms, but Indian agreements are to be read as the Indians understood and would naturally understand them."

[38]We express no opinion as to whether the performance of the United States under the 1904 and 1911 legislation was less or more advantageous to the Quechans than the terms of the 1893 Agreement. However, by accepting the benefits of the 1904 and 1911 acts, it is arguable that the Quechans should be viewed as having agreed to the United States' modification of its obligations under the 1893 Agreement. See *Chippewa Indians of Minnesota v. United States*, 90 Ct. Cls. 140 (1940).

in 1936. Solicitor Krulitz placed great emphasis on what he characterizes as "a clear and basically consistent history of administration of the non-irrigable lands by the Bureau of Indian affairs" during that period. (86 I.D. at 10.) Solicitor Austin, on the other hand, concluded that "there were substantial inconsistencies in the administrative treatment of ownership of the Yuma Reservation lands, and substantial defects in land title records that were maintained." (84 I.D. at 20.) However, he found that, in accordance with customary Departmental practice, the Secretary directed Solicitor Margold to resolve "the conflicting views and uncertainty" in 1936 (*Id.* at 28, 30). Solicitor Margold properly concluded that the pre-1936 administrative practice, even if viewed most favorably to the Quechans, could not alter the plain language of the 1893 Agreement. The California Agencies believe that Solicitor Austin's analysis is correct.

5. The Krulitz Opinion Is Contrary to Two Judicial Opinions Interpreting the 1893 Agreement.

The Margold Opinion relied in part on two decided cases by the United States District Court for the Southern District of California which, while not addressing the present issue, did have occasion to interpret the 1893 Agreement.[39] In *United States v. Johnson*, the court squarely held that the United States "obtained title to the land in issue by virtue of a contract entered into with the Yuma Indians and the plaintiff December 4, 1893, approved and adopted by the Congress August 15, 1894 (28 Stat. 322, Sec. 17)."[40] If, as the Court held, the 1893 cession carried title to the ir-

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[39]*United States v. Johnson*, Civil No. 118-C (S.D. Cal., August 2, 1935); *United States v. Walker*, Civil No. 126-J (S.D. Cal., October 10, 1933).

[40]*United States v. Johnson*, Findings of Fact and Conclusions of Law, p. 3 (August 2, 1935).

rigable lands, to the United States it must have conveyed title to the non-irrigable lands, since it relinquished "all" tribal lands without distinction as to irrigability.[41] The Krulitz Opinion does not mention either decision.

The California Agencies contend that the Krulitz Opinion is in error and should be rejected, particularly since the lands were administered for almost 43 years consistent with the Margold Opinion. Indeed, in similar situations involving boundary disputes in which the United States has been involved, this Court has held that important policy reasons dictate that assumptions as to boundaries which have long been acquiesced in by the United States and affected parties should not be disturbed.[42] That principle is particularly appropriate to the Quechan situation, for not only has there been long acquiescence in the Margold Opinion which the Krulitz Opinion would upset, but important water rights have subsequently intervened which it threatens to infringe. In particular, the Court's 1964 Decree in this case established a water right for the Yuma Indian Reservation based on representations by the United States embodying the same construction of the 1893 Agreement reflected in the *Johnson* and *Walker* cases and the Margold, Weinberg and Austin opinions. In the proposed findings and conclusions submitted to the Special Master in that case the United States interpreted the 1893 Agreement as follows:[43]

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[41]In another connection Solicitor Krulitz asserts that he "can find no legal or factual basis for separating the non-irrigable lands from the irrigable lands" under the agreement. 86 I.D. at 17.

[42]*New Mexico v. Colorado*, 267 U.S. 30, 40-41 (1925); *United States v. Texas*, 162 U.S. 1, 60-61 (1896); *Stone v. United States*, 69 U.S. (2 Wall. 525 (1865) (semble); *Missouri v. Iowa*, 48 U.S. 7 How.) 660 (1849).

[43]Findings of Fact and Conclusions of Law Proposed by the United States of America (April 1, 1959), Finding 4.8.3, p. 83.

> On December 4, 1893, an agreement was entered into between the United States and the Yuma Indians by which said Indians surrendered to the United States all their right, title, claim and interest in the Reservation established by Executive Order of January 9, 1884, for them and such other Indians as the Secretary might see fit to settle thereon. The agreement was subject to the condition that each Yuma Indian was to be allowed to select a five-acre tract on the Reservation, or in the adjoining area, which was to be allotted in severalty. The agreement provided that after allotments were made, the residue of the Reservation which was subject to irrigation should be sold by the Secretary of the Interior with the money to be used for the benefit of the Yuma Indians. This agreement was approved by Act of Congress August 15, 1894 (28 Stat. 332). The area of each allotment was increased to ten acres of irrigable land by the Act of March 3, 1911 (36 Stat. 1063).

The foregoing demonstrates that there is a serious dispute as to the proper boundary of the Fort Yuma Indian Reservation in California which has not yet been "finally determined" in an appropriate adversarial proceeding. The Court should remand the matter to the Special Master with directions (1) to conduct further proceedings on the disputed boundary with full participation by the California Agencies (2) to make a "final determination" of the proper boundary for the limited purpose of providing the necessary basis for any adjustment of the water rights awarded to the Quechan Tribe in the Court's 1964 Decree.

In the alternative, the Court should decline to award water rights to the disputed boundary lands until the boundaries have been finally determined.

IV.

THE WESTERLY BOUNDARY OF THE HAY AND WOOD RESERVE OF THE FORT MOJAVE INDIAN RESERVATION IS THE EAST BANK OF THE COLORADO RIVER IN ITS LAST NATURAL POSITION.

The second boundary dispute ruled on by Special Master Rifkind (hereinafter the "Former Master") in the prior proceedings was the westerly boundary of the Hay and Wood Reserve portion of the Fort Mojave Indian Reservation. This area, which initially was an adjunct to and part of the Camp Mojave Military Reservation before being turned over to Indian uses in 1890, has always been described in pertinent part as:

> Camp Mojave Reservation for Hay and Wood—commencing at a post marked "U.S." in mound of earth situated south 10° 43′ 41″ E. 347.52 chains distant from the flagstaff at Camp Mojave and about 20 chains southwest from the point where the road crosses the top of the mesa; thence variation 14° 08′ 28″ east, south 1° 04′ 28″ W., 272.50 chains to a post marked "U.S." in a mound of earth near the quartermaster's corrall; *thence south 76° 17′ 28″ W. 228.50 chains to a post marked "U.S." in a mound of earth near the left bank of the Colorado River; thence north 23° 01′ 32″ W. 362.70 chains to a post marked "U.S." in a mound of earth near the left bank of the Colorado River;* thence south 88° 45′ 32″ E. 369.00 chains to the post at the point of commencement. The said boundaries containing 9,114.81 acres, more or less. (Emphasis added; Prior U.S. Exh. 1324.)

In those proceedings, California took the position that the underlined portion of this description defined the Colorado River as the westerly boundary, and in accordance with usual rules, that the river, wherever it moved naturally, constituted the boundary.

The United States contended that there was an internal inconsistency in the description predicated upon their assumption that if the courses, distances and acreage delineated in the description were followed, the call to the posts in a mound near the west bank of the river could not be correct. Therein they contended that the acreage mentioned and the courses and distances prevailed over the monuments (post marked "U.S." in a mound of earth near the left bank of the Colorado River) in the description, and the only way to locate the Hay and Wood Reserve on the ground was to put the westerly boundary on the California side of the Colorado River, even though it would be located on a mesa there. The former Master found, however, that an official survey by the Field Surveying Service in 1928, and adopted by the General Land Office in 1931, was binding on the United States and thus, the westerly boundary of the Hay and Wood Reserve depicted thereon (an attempted relocation of the east or Arizona Bank as it existed in 1869) was the proper boundary. He awarded water accordingly. (Report of the former Master, pp. 281-282.)

This Court, as it did in the Colorado River Indian Reservation boundary dispute, set aside the boundary determination (*Arizona v. California, supra,* 373 U.S. at 601), but the 1964 decree (376 U.S. at 345) and the 1979 Supplemental Decree (439 U.S. at 421) contained a provision for an appropriate adjustment of water rights when the boundaries are finally determined.[44]

Subsequently, the Secretary of the Interior by order of June 3, 1974, declared null and void the 1928 survey as approved January 23, 1931, and directed a new survey

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[44]The former Master's award of water rights to the Fort Mojave Indian Reservation for the Hay and Wood Reserve was based on the 1928 survey. This award was upheld by the 1964 and 1979 decrees.

". . . to conform the acreage description of 9114.81 acres." The order refers to a Solicitor's opinion of the same date.

In the present proceedings before the Special Master, the United States and the Fort Mojave Indian Tribe insisted that the western boundary is the one established pursuant to the Secretary's order of June 3, 1974, which, in turn, was the same boundary contended for before the former Master, a line drawn on the mesa in California west of the Colorado River. The Special Master accepted the Secretarial order, ruling that the Secretary's determination as to boundaries was sufficient for purposes of this case, accepting the boundary changes put forth in the motion of the United States filed on December 22, 1978. (1982 Report, p. 76.) His findings award water rights for the area in dispute. (1982 Report, pp. 192-193, 264.)

It is our intention here to point out to the Court that there is a genuine dispute as to the location of the westerly boundary of the Hay and Wood Reserve, and that when litigated, that dispute should and will be resolved in favor of the position of the California agencies. Accordingly, this matter should be resolved before any water rights are awarded.

A. Background.

The following facts are taken from exhibits and testimony received by the former Master, with the exception of paragraph 11 relating to expert testimony which we would expect to produce at a trial of this matter on the proper method to locate the Hay and Wood Reserve on the ground today.

1. Camp Mojave was first established as a military post in 1858 to protect an immigration route which crossed the Colorado River at the north end of the Mojave Valley. (Prior U.S. Exh. 1315, p. 2.)

2. In 1869, Lieutenant George Wheeler of the Corps of Engineers was directed to, and did, survey some eight

military reservations in the territory of Arizona. In January 1869, he surveyed the Camp Mojave Military Reservation and the Reservation for Hay and Wood. In February 1870, a map of the Hay and Wood Reserve was prepared under his direction. (Prior Calif. Exh. 3501.) This map and Wheeler's notes of survey clearly show the following:

a. The Camp Mojave Military Reservation itself was located on both the Arizona and Nevada sides of the Colorado River.

b. The Flag Staff at Camp Mojave, which is the beginning monument contained in the description of the Hay and Wood Reserve, is located on the mesa on the Arizona side of the river, in the location of the living quarters and post headquarters.

c. Corners III and IV of the Hay and Wood Reserve, as designated in the description, clearly appear to be on the east or Arizona side of the river, adjoining the river, and below the mesa on the Arizona side (near Corner I).

d. The map contains this note:

> "The banks of the Colorado River between Stations III and IV of this reservation are continually changing."

3. The plats of the eight reservations surveyed in Arizona and descriptions of them were forwarded on March 12, 1870, from Maj. Gen. George Thomas of the Military Division of the Pacific, to the Adjutant General with the request that they ". . . be declared in accordance with the limits herein given." (Prior U.S. Exh. 1323.) The description of the Hay and Wood Reserve added to it the intermediate area between Camp Mojave and the Hay and Wood Reserve.

4. General Order No. 19, August 14, 1870, of the Military Division of the Pacific, proclaimed:

> "The following Military Reservations in the territory of Arizona, having been declared by the President of the United States, are hereby announced for the information of all concerned:. . ."

There followed a description of the reservations, including the same ones forwarded in March 1870 for Camp Mojave and the Hay and Wood Reservations. It also included in the latter the intermediate area between the two on the east side of the river:

> "And the intermediate tract lying between the Hay and Post Reservations, bounded on the west by the Colorado River and on the east by a line running from Station 1 of the Hay and Wood Reserve to Station 1 of the Post Reserve."

5. All parties to this proceeding at all times have agreed that the description of the Hay and Wood Reserve contained in General Order No. 19 and Wheeler's Survey, are the keys to the location of that Reserve.

6. In 1882, Congress enacted a statute (22 Stat. 181) which authorized the Secretary of War to set aside for Indian schools any vacant military posts. Pursuant to that act, President Harrison, on September 19, 1890, approved the recommendation of the Secretary of War and set aside the military reservation at Fort Mojave to be transferred to the Secretary of Interior for Indian school purposes. (Prior U.S. Exh. 1303.) All parties seem to agree that this also included turning over the Hay and Wood Reserve for these purposes, and in 1903 the Secretary of the Interior held that the intermediate tract was also included.[45]

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[45]By Executive Orders of December 1, 1910, and February 2, 1911, various alternate sections of land east and southerly of the Hay and Wood Reserve in Arizona were added to the Fort Mojave Indian Reservation. (Prior U.S. Exhs. 1304, 1305.)

7. Between 1869 and 1928 (and today), the Colorado River in the vicinity of Camp Mojave and parts of the Hay and Wood Reserve, moved several miles to the east. (Prior U.S. Exh. 1328.)

8. Pursuant to a request of the Office of Indian Affairs (Prior U.S. Exh. 1328), the General Land Office undertook a ". . . survey of the boundaries of the Fort Mojave Indian Reservation in Arizona, California and Nevada." (Prior Calif. Exh. 3502.) The instructions to the surveyor noted that in 1906 a Deputy Fisher had ". . . surveyed all of that part of the boundaries of the Fort Mojave Indian Reservation that lay east of the Colorado River. . . ." The surveyor was instructed to retrace the Fisher line, to attempt to complete the survey of the Camp Mojave Military Reservation, and then survey the reservation for Hay and Wood. As to that, the instructions read:

> "*Reservation for Hay and Wood:*
>
> "Accompanying these instructions is a blue-print of the 1869 military survey of the reservation for hay and wood. It will be observed that corners III and IV were both established on the E. side of the river. As the river has since moved a mile or more to the east these two corners are doubtless irrecoverably lost. On the small topographic map accompanying these instructions the reservation for hay and wood has been platted in accordance with the calls of the original military survey. It will be observed that corners III and IV fall on ground so high as to preclude any possibility of the river having flowed to the west thereof in 1869. This condition can only be explained by assuming serious errors in the lengths of the north and south boundaries of the reservation for hay and wood. You will, therefore, run said boundaries on their record courses but only so far to the west as will place the west boundary in a position that conditions on the ground indicate as

its probable position in 1869. In this you will, of course, be guided by the topography, the available evidences of river action and the line of demarcation where the soil loses its alluvial character. Having determined the western limit of the river, it will be necessary to make due allowance for its width in 1869. If no evidences are available on the ground, you will be obliged to follow the map of the original military survey, which indicates Corner IV about 22.00 chains E., and Corner III, 30.00 chains east of the west bank of the river." (Prior Calif. Exh. 3502.)

He was thus directed to restore Corners III and IV of the Hay and Wood Reservation, that is the Corners bordering the Colorado River.

9. Surveyor Blout followed his instructions, and completed his survey which was approved by the General Land Office in 1931. (See prior Calif. Exh. 2611.) Blout's survey notes (Prior Calif. Exh. 2616) set forth in detail what he did. Of significance here are several steps.

a. He attempted, from old maps and witnesses, to locate the west bank of the Colorado River as it existed in 1869 when Wheeler made his survey. He did so to his satisfaction, finding it near but below the mesa on the California side of the river.

b. He was unable to locate any traces of the east bank of the river as it existed in 1869, so, pursuant to his instructions, he backed off or retreated to the east a certain amount along the north and south lines of the Hay and Wood Reserve to retrace the width of the river at that time and tentatively set Corners III and IV. A line drawn between those Corners, however, deviated significantly from the bearing or call of this line in Wheeler's survey. He therefore moved Corner III further to the east, and then drew the III-IV line at a bearing closer to Wheeler's.

c. The acreage contained in Blout's resurvey is significantly less than the 9114.81 acres more or less listed in Wheeler's survey.

d. Blout's survey was dependent on Fisher's 1906 survey, and was keyed to Fisher's relocation of Corner I of the Camp Mojave Reservation and the Flag Staff on it.

10. The attempts by the United States to relocate the Wheeler Survey by courses, distances and acreage, places Corners III and IV and the westerly boundary well up on the mesa of the California side of the river in a place where the Colorado River never was in 1869 or any other time. (See testimony of witness Rupkey, Prior Tr. pp. 14,159-161; 14,167-172; Prior Calif. Exh. 2616.)

11. The California Agencies are prepared to present competent and expert testimony to show that a proper location of Corner I of the Camp Mojave Reservation and the Flag Staff and a proper resurvey of Wheeler's survey of the Hay and Wood Reserve reveal:

a. All courses and distances set forth in the Wheeler survey of the Hay and Wood Reserve and the acreage calculation of 9114.81 acres more or less, can be located entirely on the East side of the Colorado River in 1869;

b. Lieutenant Wheeler's monuments for Corners II and III of the Hay and Wood Reserve were set on the east bank of the river in 1869.

c. The westerly boundary of the Hay and Wood Reserve was intended to be the Colorado River.

B. The Colorado River Was Intended to Be the Westerly Boundary of the Hay and Wood Reserve.

The question presented is what was intended by this language in the Wheeler description of the Hay and Wood Reserve:

". . . thence south 76° 17′ 28″ west 228.50 chains to a post marked 'U.S.' in a mound of earth near the left bank of the Colorado River; thence north 23° 01′ 32″ W. 362.70 chains to a post marked 'U.S.' in a mound of earth near the left bank of the Colorado River; . . . ."

This court answered this question over a hundred years ago in *County of St. Clair v. Lovingston*, 90 U.S. (23 Wall.) 46 (1874). Among the boundaries under consideration by the Court in that case was a survey 579, which was described in part:

" 'Beginning on the bank of the Mississippi River opposite to St. Louis, from which the lower window of the United States storehouse in St. Louis bears N. 70¾ W.; thence S. 5 west 160 poles to a point in the river from which a sycamore 20 inches in diameter bears S. 85E. 250 links. . . ." 90 U.S. at 65.

The court first reviewed the law on the subject and then concluded:

"It may be considered a canon in American jurisprudence, that where the calls in a conveyance of land, are for two corners at, in or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise." (*Id.* at 62.)

Thus, the description in the Hay and Wood Reserve making calls to monuments near the bank of the Colorado River with a straight line drawn between those points designates the river as the boundary.[46]

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[46]The use of the term "near" the bank instead of "on" or "at" the bank, is immaterial. In *Burkett v. Chestnutt*, 212 S.W. 271 S.W. (Tex. Civ. App., 1919) the Court cited the *County of St. Clair* case for this proposition:

"In fact, the trial court could have so construed the wording of the patent to mean 'on' the river bank, for 'near the river bank', as expressed in the original field notes, means the same thing. . . ."

Moreover, there is nothing to show any contrary intent.[47] Indeed, the circumstantial evidence only supports the conclusion that the Colorado River was to be the westerly boundary of the Reserve. The Hay and Wood Reserve was created to be precisely that — a reserve for growing and gathering of hay and wood for use at Camp Mojave. The center of life at the camp was on the mesa on the Arizona side of the Colorado River. It would have made no sense to put part of the Reserve on the California side, thereby requiring difficult crossings of the then untamed river. Further, Wheeler's map indicates the banks of the river in the area of the two Corners in question were constantly changing, thereby indicating an intent that the river be the boundary. Finally, apparently for many years the Indian services considered the river to be the boundary of the Hay and Wood Reserve, just as it was for the intermediate tract. See, for example, the 1913 Indian Service Map of July 1913 (Prior Calif. Exh. 3500-A), which clearly shows the Camp Mojave Military Reservation on both sides of the river, but the Hay and Wood Reserve stopping at the River.

Once concluding that the Colorado River was intended to be the boundary, then the usual rule that ". . . when changes take place by the slow and gradual process of accretion, the boundary moves with the shifting in the main channel's course . . . [A] sudden or avulsive change in that course does not move the boundary but leaves it where the channel formerly had run." (*Kansas v. Missouri*, 322 U.S. 213, 215, (1944). See also *County of St. Clair v. Loving-*

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[47]The memorandum of the Associate Solicitor of Indian Affairs dated April 12, 1974 suggested, on p. 18, that the ambiguities should be construed in favor of the Indians. This, however, overlooks the fact that the description involved, when created, was designed to delineate a military reservation, not an Indian Reservation. A copy of the memorandum is being lodged with the Court. We request that this Court take judicial notice of said memorandum pursuant to Federal Rule of Evidence 201.

ston, supra, 90 U.S. at 68; *Arkansas v. Tennessee*, 397 U.S. 88, (1970), *Missouri v. Nebraska*, 196 U.S. 23, 35, (1904) and see discussion concerning Colorado River Indian Reservation boundary, *supra*. In the instant matter, the Colorado River has, over the years, moved to the east over most of the area in question, thereby reducing the size of the Hay and Wood Reserve. More importantly, that Reserve is located, now, as it always has been since 1870, on the east side of the River.

C. A Correct Resurvey Demonstrates That There Are No Ambiguities in the Description of the Hay and Wood Reserve.

The 1928 Blout Survey by the General Land Office for the Indian Service, was premised, falsely we believe, on an unstated determination that the westerly boundary of the Hay and Wood Reserve was on a line fixed as of the time of Wheeler's survey in 1869, that is, not the river and not a moving boundary. The Blout survey was, secondly, based on the 1906 Fisher survey which purported to relocate the northeast corner, (Corner I) of the Camp Mojave Military Reservation and the Flag Staff at the camp. From those points, a resurvey of the Wheeler survey runs into serious difficulties, unless done correctly, in that the courses and distances for the north and south lines (Corner IV to Corner I, and Corner II to Corner III, respectively) will result in Corners III and IV of the Hay and Wood Reserve being located high on the mesa on the California side of the River.

Given the starting premises, the Blout Survey was directed to proceed on at least one proper premise: to honor the long standing rule that monuments prevail over courses and distances or acreage. Turning again to this Court's decision in *County of St. Clair v. Lovingston, supra*, it was said:

> "It is a universal rule that courses and distances yield to natural and ascertained objects . . . a call for a natural object, as a river, a spring, or even a marked line, will control both courses and distances. . .
>
> "Artificial and natural objects called for, have the same effect. . . ." 90 U.S. at 62, (citations omitted.)

The rules of construction call for a priority, — 1. Natural monuments or objects; 2. Artificial monuments or objects; 3. Courses and distances; 4. Quantity. *United States v. Redondo Development Co.* 254 F. 656, 658 (8th Cir. 1918). See, 11 C.J.S. *Boundaries* § 47. In accordance with these rules, Surveyor Blout in 1928 was instructed to try to find the artificial monuments for Corners III and IV of the Hay and Wood Reserve, and lacking that, to reestablish them. *United States v. Reimann*, 504 F.2d 135, 140; (10th Cir. 1974); *Hiltscher v. Wagner*, 96 Cal.App. 66, 68; (1928). By doing this, Blout reestablished the Corners and noted that under the rules of priority, the courses and distances and quantity gave way.

In contrast, the United States seeks to reverse this priority list and make quantity the key, and thereby totally ignore the monuments and the calls to the east bank of the Colorado River. The result is to place Corners III and IV high on the mesa on the California side of the river in positions where the river never has been and never could have been. Such, of course, is directly contrary to the law. The Associate Solicitor claims that cases such as *White v. Luning*, 93 U.S. 514, 524 (1876), allow the rules to be applied flexibly in order to carry out the intent of the grantor or surveyor. We do not quarrel with that principle. The Government's attempted application of it to this case, however, is ludicrous. Lieutenant Wheeler was not attempting to survey a tract of precisely 9114.81 acres. That figure is obviously a mathematical calculation arrived at after the tract was surveyed.

Lieutenant Wheeler was laying out a reserve for Hay and Wood for the military post on the east side of the Colorado River below the mesa. There is absolutely no basis for not applying the usual rules of priority for calls, and recognize the calls to monuments for Corners III and IV.

More importantly, the California Agencies desire to present evidence through expert testimony that will conclusively show that there are no conflicting calls. A proper retracing of Lieutenant Wheeler's notes of survey starting with Corner I, and the Flag Staff of the Camp Mojave Military Reservation properly relocated, will fit *in toto* as to courses and distances on the east side of the Colorado River as it existed in 1869 and contained 9114.81 acres more or less.[48] This evidence will also strongly support the conclusion that the westerly boundary of the Hay and Wood Reserve is the Colorado River.

The above amply demonstrates that there is a genuine dispute as to the location of the westerly boundary of the Hay and Wood Reserve. The Special Master has accepted, without reservation or inquiry, the unilateral decision of the Secretary of the Interior to determine that boundary in a way that is contrary to law and in total avoidance of the facts or reality. The Special Master proposes to award substantial water rights based on that decision, to the immediate detriment of the California Agencies. That boundary should be litigated in full and fairly before any such rights are awarded or affirmed.

---

[48]Surveyor Blout was unable to find any traces of the monuments set by Lieutenant Wheeler in 1869, primarily, according to him, because the river had moved to the east, and by flooding had undoubtedly washed them out. Although we contend that Mr. Blout was looking in the wrong place for these monuments, we do agree that the likelihood of finding any traces of them is minimal. They can, however, be reestablished with proper surveying techniques.

V.

THE SPECIAL MASTER HAS ERRED IN AWARDING WATER TO RIVER BED LANDS SINCE THOSE LANDS BELONG TO CALIFORNIA AND ARIZONA, RESPECTIVELY.

The Special Master, by acceptance of unilateral administrative actions and orders of the Secretary of the Interior, has acted erroneously with regard to river bed lands of the Colorado River with regard to the Fort Mojave, Fort Yuma and Colorado River Indian Reservations. Pursuant to *Montana v. United States*, 450 U.S. 544, 551 (1981), the United States generally reserves lands under navigable waters for states upon their admission to the Union. It is clear that California having been admitted as a state in 1850, prior to the creation of the reservations in question, received title to the western half of the river bed in its last natural position immediately, and no substantial evidence exists which would indicate any intent other than to convey the eastern half of the river bed in its last natural position to the state of Arizona, which was admitted to the Union in 1912.

Therefore, the actions of the Secretary with regard to these river bed lands are totally void and without merit, since the lands belong to the States of California and Arizona, respectively.

VI.

CONCLUSION.

In reviewing this matter, we are simply appalled by the position urged by the United States and acceded to by the Special Master. That position is that by government fiat, Secretarial orders and legal proceedings to which we were not parties, our vital water rights, the supply for some 12 million people, can be reduced; that despite the experience of the original case, where the United States' boundaries position were rejected, that there is no forum and no opportunity to challenge the altered reservation boundaries;

that no matter how egregious the United States' error, it is conclusive.

We submit, so repugnant a contention does not find support in our system of justice. We respectfully urge that this Court reject the findings and water allocation recommendations of the Special Master based upon the so-called "boundary lands" or, in the alternative, remand the claims of additional water allocations for "boundary lands" with instructions to try all issues resulting from the State Parties' challenge of the reservation boundaries asserted by the United States and the Tribes.

Respectfully submitted,

The Metropolitan Water District of Southern California,

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Deputy County Counsel,

By CARL BORONKAY.

LODGING

RECEIVED
MAY 25 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

The Metropolitan Water District of Southern California

May 24, 1982

Clerk of the Supreme Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Dear Sir:

Arizona v. California, et al., No. 8 Original, October Term 1981

Enclosed are 11 copies of the Opinions of Solicitor Margold--1936, Solicitor Weinberg--1968, Associate Solicitor, Indian Affairs--April 12, 1974, and 11 copies of the Amended Complaint, Motion to Dismiss and Order thereon in The Metropolitan Water District of Southern California, et al. v. United States, et al., Civil Action No. 81-0678-GT(M), which we ask be lodged in the above-entitled action, with one copy of each being returned to me in the enclosed self-addressed stamped envelope as a conformed copy.

The Opinions of Solicitors Margold and Weinberg* are referred to in footnote 30 of the Brief of the State Parties in Support of Their Exceptions to the Report of Special Master Tuttle ("State Parties' Brief"). The Margold Opinion is referred to in footnote 22 and the Weinberg Opinion in footnote 23 of the Brief of the California Agencies in Support of Their Exceptions to the Report of Special Master Tuttle ("California Agencies' Brief"). The parties have requested that the Court take judicial notice thereof. The Associate Solicitor Opinion of April 12, 1974, is referred to in footnote 47 of the California Agencies' Brief and the Court has been asked to take judicial notice of the Opinion.

*The Weinberg Opinion refers to enclosures accompanying the Opinion. We have been unable to locate these items, but will lodge such enclosures with the Court if they become available.

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The pleadings in The Metropolitan Water District of Southern California, et al. v. United States, et al., which we have also enclosed, are referred to in footnote 41 of the State Parties' Brief and are also referred to in footnote 12 of the California Agencies' Brief. The Court has been asked to take judicial notice thereof.

Also enclosed for filing is the original and one copy of a certificate of service indicating that these documents have also been served upon the interested parties.

If you should have any questions regarding this matter, please contact me at your earliest convenience.

Very truly yours,

Carl Boronkay
General Counsel

Enclosures

cc: Per Certificate of Service

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Flanery.

Roddis
Westwood
Greven

M. 28198.

SOLICITOR'S OPINION

Re:

Did the agreement of December 4, 1893, as ratified by the act of August 15, 1894 (28 Stat. 332), extinguish the Indian title to the non-irrigable lands within the Yuma Indian Reservation.

JAN - 2 1936

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M. 28198.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON

Synopsis

He: 1. Held the agreement of December 4, 1893, as ratified by the act of August 15, 1894 (28 Stat. 332), extinguish the Indian title to the non-irrigable lands within the Yuma Indian Reservation.

2. Assuming that the possessory rights of the Indians in the non-irrigable land continued, is the tribe entitled (1) to the value of the land taken for a right of way for the All-American Canal located across the non-irrigable land of the reservation as established by Executive order of January 9, 1884 (2) to recover damages as a result of seepage and alkali, and to require a bond to insure prevention of, and payment for, such damage (3) to recover damages for failure of the canal (4) to the value of mineral deposits within the right of way (5) to payment for sand and gravel taken from the non-irrigable lands outside of the right of way and used for the canal or made non-usable by the construction of the canal (6) to require bridges over the canal to render accessible land and gravel deposits located on the non-irrigable lands and (7) to a royalty from the development of hydroelectric power.

Held: 1. The agreement with the Yuma Indians as ratified by the act of August 15, 1894, supra, extinguished the Indian title to the non-irrigable lands of the Yuma Reservation.

2. That the non-irrigable area will not become a part of the public domain until opened to disposition under the general land laws by presidential proclamation.

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3. That the claims asserted in behalf of the Indians, listed above under Nos. 1, 4, 5, 6, and 7, all of which depend for recognition upon the establishment of Indian title to the non-irrigable lands, cannot be sustained.

4. That the liability of the Imperial Irrigation District for damages occasioned by seepage, canal breaks, etc., (claims 2 and 3 above) depends upon the ordinary rules of negligence, and that the Secretary of the Interior is without authority to exact a bond from the District covering its contingent liability in this respect.

Noted
Ruben Taylor
Press Section

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington

M. 28194.

January 8, 1936

The Honorable

The Secretary of the Interior.

My dear Mr. Secretary:

You have submitted to me for an opinion two questions propounded by the Commissioner of Indian Affairs in his letter of October 2, 1935. The questions are as follows:

> "1. Did the Act of August 15, 1894 (28 Stat., 332), which ratified the agreement with the Indians hereinabove referred to, actually either in law or fact make the non-irrigable lands ceded by the Indians through the provisions of the agreement a part of the public domain so as to extinguish any right, title, or interest therein, legal or equitable, which may have vested in them?
>
> 2. Assuming that such legislation did not return the lands to the public domain, or did not extinguish such right, title, or interest, is there any reason why this Office is not entitled to request, for the benefit of the Indians, any or all of the various features set forth in our letter of May 10, 1935 to the Commissioner of the Bureau of Reclamation?"

The dispute which gives rise to these questions is due to the construction by the Bureau of Reclamation of the All-American Canal from the headworks at the Imperial Dam across the Colorado River at a point 12 miles upstream from the City of Yuma, Arizona, thence southwesterly on the California side of the Colorado River to the boundary line between California and Mexico. The All-American Canal in its course

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thus described crosses the length of the disputed Yuma Indian Reservation. The right of way for the canal was assumed by the Indian Office to cross Indian tribal lands for which compensation should be allowed and paid from the appropriation made for the construction of the All-American Canal. The claims for compensation and for guarantee against future damages from the operation of the canal are set forth in a letter dated May 10, 1935, from the Commissioner of Indian Affairs to the Commissioner of the Bureau of Reclamation. The claims are as follows:

"1. Value of Land

In accordance with the appraisal of October 29, 1934, the value of the lands occupied by the right-of-way through the Fort Yuma Indian Reservation and the cash remuneration due the Yuma Indians therefor is fixed at $8,602.50 on the basis of $1.50 per acre.

2. Damage as a Result of Seepage and Alkali

Providing seepage conditions on the Fort Yuma Reservation are aggravated or intensified by the All-American Canal, the District agrees to prosecute diligently the construction of such intercepting drains, installation of pumping plants including necessary transmission lines, or construction of such other works as are necessary to control underground water affecting the Indian irrigation project. The cost of operation and maintenance of such drainage works, including electrical energy if required, shall be borne by the District. If prior to the effective operation of such drainage works any Indian land is made unproductive by water logging, from alkali or other causes as a result of operation of the said canal, the Indian or Indians affected shall be compensated for losses suffered during the time such land is unproductive.

Damages, either temporary or permanent, to Indian land as a consequence of the operation of the All-American Canal shall

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be determined and payment made therefor at such time and ... such manner as the Secretary shall prescribe. A bond in the amount of $300,000 shall be furnished by the District to insure installation and operation of drainage works and payment of damages.

3. Damages Resulting from Failure of Canal

In the event of failure of the All-American Canal from any cause whatsoever resulting in damage or destruction of adjacent Indian lands and property, the Yuma Indians shall be reimbursed by the District for any and all damages resulting from failure of the canal. Such damage shall be determined and payment made therefor at such time and in such manner as the Secretary shall prescribe.

4. Mineral Deposits

If during the construction of the All-American Canal or at any time there should be discovered or encountered within the right-of-way any mineral deposits, either placer or ledge, of such value in the opinion of the Commissioner of Indian Affairs as to justify recovery, such mineral deposits shall be and become property of the Yuma Indians, and the Commissioner of Indian Affairs, in behalf of the Yuma Indians, shall make such arrangements as he may deem necessary and proper to recover such mineral deposits in such a way as not to impede or hinder the construction or operation of the Canal.

5. Sand and Gravel Deposits

The Yuma Indians shall be paid at the rate of 10¢ per yard for all sand and gravel taken from the Picacho Wash pit and the pits in Sections 19 and 24, for use on the All-American Canal Construction work and for any and all sand and gravel within economic limits of recovery in such pits made non-usable as the result of the Canal construction. The extent and value of deposits excavated out of the Canal and wasted or covered up, or otherwise made inaccessible shall be determined by a committee appointed by the Secretary, one member to be selected by the Yuma Indian Tribal Council, one member to be selected by the District and one to be selected by the other two members and payment therefor

shall be made in such manner as the Secretary may prescribe.

Bridges Across Canal

In order that the hill and mesa lands of the Indian Reservation, whereon are several extensive sand and gravel deposits of considerable value, may be accessible from the valley it is required that there be constructed, free of cost to the Yuma Indians, four bridges across the All-American Canal, located approximately as follows: (1) Picacho Wash, (2) NW¼, Sec. 16, T. 1[illegible] S., R. 22 E., (3) Sec. 24, T. 16 S., R. 21 E., and (4) Sec. 24, T. 16 S., R. 21 E., near Araz Junction. The definite locations for these crossings shall be selected by a representative of the Commissioner of Indian Affairs, when final location of the Canal, including location and type of appurtenant structures in the respective vicinities above mentioned are determined.

Hydroelectric Power Development

The contract of December 1, 1932, between the United States and the Imperial Irrigation District recognizes power possibilities on the All-American Canal and reserves to the District, subject to provisions for participation by other agencies, the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal below and not including the Syphon Drop site. Present plans contemplate the development of 30,000 KW at the Pilot Knob site in addition to a possible development of 5,000 KW at the Syphon Drop site, the latter being reserved to the United States.

The All-American Canal right-of-way through the reservation, accordingly is, in fact, a valuable power site. As one of the considerations for granting of the said right-of-way, it is believed the District should pay as rental for the use of all power sites along said canal within the reservation below Syphon Drop, annual charges in the amount of one dollar ($1) per horsepower of installed generator capacity, such payments for any power unit to be made for each calendar year from and after the first of January next following the date of which the unit is placed in commercial operation.

It is believed the Yuma Indians are likewise entitled to rental for the site at Syphon Drop. Since the power generated at this site is reserved to the United States the agreement will be necessarily between the Bureau of Reclamation and the Office of Indian Affairs and should contain the same provision for rental per horsepower per year of all generator capacity in addition to the present installed capacity of 1,000 KW."

After some negotiations between the bureaus, on July 15, 1935, the Commissioner of the Bureau of Reclamation advised the Commissioner of Indian Affairs that the land taken for right of way for the All-American Canal was not susceptible to irrigation, that title to non-irrigable land was vested in the United States by virtue of the act of August 15, 1894 (28 Stat. 332), that the land constituted a part of the public domain, and that, therefore, the Yuma Indians had no interest in the land.

On July 6, 1883, President Arthur by Executive order set aside a tract of country in the Territory of Arizona described by metes and bounds as beginning at a point in the channel of the Colorado River, opposite the mouth of the Gila River, thence up the channel of the Gila River to the range line between ranges 19 and 20 of the Gila and Salt River meridian, thence north on the range line to the first standard parallel south, thence west on the parallel to the Colorado River, thence down the channel of Colorado River to the place of beginning to be used as a reservation for the Yuma and such other Indians as the Secretary of the Interior may see fit to settle thereon.

On the following January 9, 1884, by Executive order the President canceled the reservation in Arizona and created a reservation for the same Indians in California. This Executive order reservation on the California side of the river comprises the area which is the subject of this opinion.

The new reservation is described in the Executive order as beginning at a point in the middle of the Colorado River, due east of the meander corner to Secs. 19 and 30, T. 15 S., R. 24 E., S. B. M., thence west on the line between Secs. 19 and 30 to the range line between Rgs. 23 and 24 E., thence continuing west on the section line to a point, which, when surveyed, will be the corner of Secs. 22, 23, 26 and 27 in T. 15 S., R. 21 E., thence south on the line between Secs. 26 and 27 in said township to the intersection of the international boundary, thence easterly on the international boundary to the middle of the channel of the Colorado River, thence up said river in the middle of the channel to the point of beginning.

The area of the reservation was not changed until an agreement made December 4, 1893, at Fort Yuma, Arizona, between the Indians and three Commissioners representing the United States. These Commissioners were the representatives of the Office of Indian Affairs and the agreement made with the Indians was supposed to be for their benefit. The first paragraph of Article I of the agreement is as follows:

> "The said Yuma Indians, upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, title, claim, and interest in and to and over the following-described tract of country in San Diego County, Cal., established by executive order of January ninth, eighteen hundred and eighty-four, which describes its boundaries as follows: * * *" (Describes entire Yuma Reservation established January 9, 1884.)

Article II of the agreement provides, among other things, that

> "Each and every member of said Yuma Indians shall be entitled to select and locate upon said reservation and in said irrigable sections five acres of land, which shall be allotted to such Indian in severalty. * * *"

(The area in the irrigable allotment was increased to ten acres of irrigable land by the act of March 3, 1911 (36 Stat. 1065).)

Article III of the agreement provides for the allotments by a special agent appointed by the Secretary of the Interior and after all of such allotments have been made and approved "then all of the residue of said reservation which may be subject to irrigation shall be disposed of by the Secretary of the Interior by sale to white settlers at the appraised value of the land. (Emphasis supplied)

Article VI of the agreement provides that

> "All lands upon said reservation that can not be irrigated are to be open to settlement under the general land laws of the United States."

Article VII provides

> "There shall be excepted from the operation of this agreement a tract of land, including the buildings, situate on the hill on the north side of the Colorado River, formerly

> Fort Yuma, now used as an Indian school, so long as the same shall be used for religious, educational, and hospital purposes for said Indians, and a further grant of land adjacent to the hill is hereby set aside as a farm for said school; the grant for the school site and the school farm not to exceed in all one-half section, or three hundred and twenty acres."

By the act of August 15, 1894 (28 Stat. 332), Congress accepted, ratified and confirmed the agreement made with the Indians on December 4, 1893. The act also provided for expenditure of funds to carry out the terms of the agreement. It directed the Secretary of the Interior to allot the lands susceptible to irrigation until each and every Indian had received an allotment and to appraise and sell the remaining irrigable lands to white settlers. The following language of the act refers to the disposition of the nonirrigable lands:

> "That all the lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain, and shall be opened to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws."

Pursuant to the act of June 17, 1902 (32 Stat. 388), the Bureau of Reclamation has constructed the Yuma Irrigation project. The diversion of water from the Colorado River was accomplished by the construction of the Laguna Dam located about eight miles upstream from the City of Yuma. The main canal carries the water from the California end of the dam to a point near Yuma where it passes under the river in a conduit. The position of the canal in California made

it possible to irrigate about 8,000 acres of land in the Yuma Indian Reservation. Approximately half of the area was used for Indian allotments and the remainder sold after appraisal to white settlers. This area, considerably reduced by seepage and other causes, now constitutes the Reservation Division of the Yuma project. After investigation and after topographical and subdivisional surveys of the reservation were made, an administrative determination fixed and designated the irrigable area and fixed and designated the area not susceptible of irrigation. Each of the Indians on the Yuma Reservation was allotted as directed by the acts of Congress of August 15, 1894, and March 3, 1911, supra, and the remaining irrigable lands were appraised and sold at public sale. However, at no time have the non-irrigable lands been opened to settlement and sale by proclamation of the President as provided in the above-quoted paragraph of the act of August 15, 1894.

It is reasonably evident, I think, that the non-irrigable lands did not become a part of the public domain at the time of execution and ratification of the agreement with the Indians. Article VI of the agreement merely says that all lands upon said reservation that cannot be irrigated "are to be open to settlement under the general land laws of the United States." The time of opening the lands to settlement is not specified, but some future date was apparently in contemplation, because no classification of the lands into irrigable

and non-irrigable had then been made and until there was such a classification the particular lands which were to be subject to settlement under the general land laws could not be identified. The ratifying act is more specific. It provides that the non-irrigable lands "shall become a part of the public domain, and shall be open to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws". The emphatic use of the future tense in this declaration is inconsistent with the view that the lands became a part of the public domain immediately, and bearing in mind that the words "public domain" or "public lands" are habitually used in Federal legislation to describe such lands as are subject to sale or disposal under the general land laws, (Newhall v. Sanger, 92 U. S. 761, 763; 10 L. D. 367) it seems that Congress intended that the non-irrigable lands should become a part of the public domain on the same date that they are made subject to settlement and disposition under said general land laws by presidential proclamation. In this view, the non-irrigable lands will not become a part of the public domain until such proclamation issues.

The fact that the non-irrigable lands have not yet become part of the public domain is not, however, decisive of the question at hand. The question is one of ownership as between the United States and the

Indians and this depends primarily upon the provisions of the agreement of 1893 as ratified by Congress. It is argued by the Indian Office that the non-irrigable lands have been continuously administered as a part of the Indian Reservation since execution and ratification of the agreement; that the lands have been leased for grazing and mining purposes; and that the proceeds from such leases have been covered into the Federal Treasury for the benefit of the Yuma Indians. But this administrative recognition of Indian ownership is not controlling (Harris v. Bell, 254 U. S. 103, 109; Tapp v. Stuart, 9 Fed. Supp. 23), and must give way if in conflict with the plain terms of the agreement and ratifying act. The provisions of the agreement and act received consideration in two cases decided August 2, 1935, in the district court of the United States in and for the Southern District of California. See United States v. Sid Johnson and Mrs. Sid Johnson; United States v. M. C. Walker and Mrs. M. C. Walker (unreported). These were ejectment suits brought by the United States against squatters on lands within the reservation which were susceptible of irrigation. While non-irrigable lands were not involved, the decisions interpreted the agreement and act as vesting full title in the United States immediately subject only to the rights specifically reserved in the Indians, which reserved rights, as will hereafter be shown, extend to the irrigable lands only. The inference to be drawn from

those decisions in so far as the non-irrigable lands are concerned is that the relinquishment by the Indians became effective immediately rather than at some future date, and this, I think, is the correct view.

Article I of the agreement declares that the Yuma Indians, upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, title, claim and interest in and to" all of the lands within the reservation boundaries. This language imports in clear and precise terms a present relinquishment or cession of all of the interest of the Indians in the reservation lands. The relinquishment or cession is made subject to the conditions thereinafter stated, but those conditions in no way qualify the absolute nature of the relinquishment or cession with respect to the non-irrigable lands. The conditions materially affecting the relinquishment or cession have to do only with the irrigable lands, subjecting them to allotments in severalty to the individual Indians and sale for the benefit of the Indians as a whole. As to the irrigable lands, therefore, the cession or relinquishment was not absolute, but in trust for the use and benefit of the Indians. The beneficial ownership of the Indians in the irrigable lands thus continued notwithstanding the relinquishment or cession. See Ash Sheep Company v. United States, 252 U. S. 159. Neither the agreement nor the ratifying act, however, contains any word or clause qualifying or limiting the absolute cession

made of the non-irrigable lands by Article I of the agreement. Both recognize that those lands are to become a part of the public domain and be disposed of under the general land laws. The words "hereby surrender and relinquish", as applied to the non-irrigable lands, coupled with the declaration that such lands shall become a "part of the public domain" and "be opened to settlement and sale", without the reservation of any interest in the Indians and unaccompanied by any condition in the nature of a trust, express or implied, obviously import an absolute extinguishment of all the interest of the Indians in and to that class of lands. In such a situation, there is no authority to depart from the plain words of the agreement and act. In United States v. Choctaw Nation, 179 U. S. 494, the contention was made that a treaty, the terms of which made an absolute cession, should be interpreted to create a trust for the benefit of the Indians. The Court rejected the contention, saying among other things (page 535):

> "But if the words used in the treaty of 1866, reasonably interpreted, import beyond question an absolute, unconditional cession of the lands in question to the United States free from any trust, then the court cannot amend the treaty or refuse to carry out the intent of the parties, as gathered from the words used, merely because one party to it held the relation of an inferior and was politically dependant upon the other, or because in the judgment of the court the Indians may have been overreached. To hold otherwise would be practically to recognize an authority in the courts not only to reform or correct treaties, but to determine questions of mere policy in the treatment of the Indians which it is the function alone of the legislative branch of the Government to determine."

While the irrigable or non-irrigable character of the lands within the reservation had not been determined on the date of the agreement of relinquishment or cession, it is clear that the taking effect of the relinquishment or cession was not postponed until classification of the lands as non-irrigable. In this respect, the situation is closely analogous to that involved in the grants of swamp lands made to the States by the act of September 28, 1850 (9 Stat. 519). That act, like the agreement under consideration, was in the usual terms of a grant in praesenti, and there, as here, the character of the lands was determined at a subsequent date. The courts have uniformly ruled that the States became immediately invested with an inchoate title which became perfect, as of the date of the act, when the land was identified and the patent issued (see United States v. Minnesota, 270 U.S. 181, 203, 205). Applying a like rule here, the relinquishment of the Indians, as and when the non-irrigable character of the lands was determined, became fully effective as of the date of the agreement.

The case of United States v. La Champelle (81 Fed. 152), which has been called to my attention as supporting the claim of Indian ownership of the non-irrigable lands, is not in point. In that case, an agreement had been entered into between the Secretary of the Interior and Chief Moses, purporting to represent the Indians of the Columbia Reservation. Under the provisions of the agreement, the

Indians, in consideration of a sum of money, agreed to remove to another reservation and that the Columbia Reservation should be opened to settlement, except that any Indians who desired to remain might do so in which event lands not exceeding 640 acres to each family should be selected for them. The lands were thrown open to settlement before allotment selections had been made. The Indians who remained on the lands did not acknowledge the authority of Chief Moses to represent them. White men attempted to settle on the lands and were resisted by the Indians, whereupon the Indians were forcibly removed by the United States troops and imprisoned. During their imprisonment, the white settlers seized their improvements, settled on the land and filed homestead declarations which were first accepted and later canceled. Suits were then brought by the United States to oust the settlers from possession. The court ruled that the President was without authority to open the lands to settlement under the homestead laws until after allotment selections had been made for the Indians; that the opening of the lands was premature; that the lands had not become a part of the public domain; and that the Indians who remained on the lands were not bound by the agreement entered into with Chief Moses "for the reason that they never gave their assent, and Moses had no authority to represent them". This ruling is without application here for the reason, first, that there has been no premature opening of the lands in the Yuma Reservation to settlement under

the general land laws; second, no question is raised as to the validity of the agreement with the Yuma Indians; and third, the stipulations of the agreement have been carried out by the United States and the Indians have received and accepted the allotments and other benefits promised them. In this situation, the question -- and it is one upon which the decision in the La Chappelle case has no bearing -- is whether the Indian title to the remaining lands classed as non-irrigable has been extinguished. The plain terms of the Yuma agreement require that that question be answered in the affirmative.

It follows from what has been said that the claims asserted on behalf of the Indians and listed above under Nos. 1, 4, 5, 6, and 7, all of which depend for recognition upon the establishment of the Indian title to the non-irrigable lands, cannot be sustained.

Regarding the liability of the United States or that of the Imperial Irrigation District for damages caused by seepage, percolation, or breaks in the canal (see claim listed above as Nos. 2 and 3), the law does not make the concern engaged in the carriage of irrigation water an insurer of others against damage from breaking, overflow, seepage or other escape of the water. The famous English case of Rylands v. Fletcher (L. R. 3 H. L. 330), declared that a man builds a reservoir or other works to hold water at his peril. This is not the law in the West. The ditch owner is not liable merely because the break or escape occurred, but only if it occurred through his negligence.

Heidelind v. Tuolumne, etc. Company (12 Pac. 307); Tulley v. Platt County (28 Pac. 129). In the operation of a canal the ordinary rule of negligence applies, namely, that there must be a failure to use the care which an ordinary prudent man would have taken under the circumstances. Parker v. Gregg (136 Cal. 413, 68 Pac. 22). Until the All-American Canal is completed and used, it will be impossible to tell whether seepage will result. A break in the canal might occur if unprecedented conditions arise. If actionable damages occur for any reason while the canal is being operated and maintained by the Imperial Irrigation District, a judgment against the District could be satisfied under the California laws. In the meantime, I do not think the Secretary of the Interior has any authority to require the District to give bond in the amount of $200,000 or in any other amount guaranteeing the contingent liability of the District. No statutory provision of which I am aware empowers the Secretary to exact such a bond. In the absence of such a statutory provision, the District cannot be compelled to give bond unless the obligation so to do is imposed by its existing contract with the United States under which the United States is constructing the All-American Canal for the District at the expense of the District. That contract, which fixed in detail the rights and obligations of the parties both before and after the District takes over the operation and maintenance of the canal, contains no provision

requiring the District to give bond, nor does it contain any reservation of power in the Secretary which may be invoked as authorizing him to exact a bond. The obligation to give bond, therefore, is one which the District has not agreed to assume and which cannot now, in view of the existing contract, be enforced without its consent.

Respectfully,

(Sgd) Nathan R. Margold,
Solicitor.

Approved: January 8, 1935.

(Sgd) T. A. Walters,
First Assistant Secretary.

IN REPLY REFER TO
F-66-1038.5323

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

JUN 2 2 1966

Memorandum

To: Secretary of the Interior

From: Solicitor

Subject: Status of Land in T. 16 S., R. 22 and 23 E., SBM Proposal for Lease to Yuma County, Arizona

I have completed my review of the status of certain land in T. 16 S., R. 22 and 23 E., SBM proposed for lease to Yuma County for park, airport and recreational purposes.

For convenient reference, the lands involved will be referred to as separate parcels. Parcel One consists of land in Sections 25 and 36, T. 16 S., R. 22 E. and in Sections 30 and 31, T. 16 S., R 23 E., SBM, lying between the upper reservation levee and the present Arizona-California State line. Parcel Two consists of lands in Section 36, T. 16 S., R. 22 E. and in Section 31, T. 16 S., R. 23 E., SBM, lying on both sides of the present channel of the Colorado River between the upper reservation levee and the abandoned 1953 channel.

For reasons hereafter set forth, I have concluded that the proposed lease is legally unobjectionable if Parcel One is excluded.

Both parcels are accretions to lands of the old Fort Yuma Military Reservation formerly within the Yuma Indian Reservation. The issue presented is whether the Quechan Tribe of the Fort Yuma Reservation thereby has such a beneficial interest in either parcel as to render its inclusion in the proposed lease legally inadvisable. Claims for compensation on account of both parcels are embraced within the action awaiting decision by the Indian Claims Commission entitled The Quechan Tribe of the Fort Yuma Reservation, California v. The United States of America, Docket No. 320.

By an act of August 15, 1894 (28 Stat. 332), the Congress ratified an agreement of December 4, 1893 with the Yuma Indians under which the Indians ceded, inter alia, all rights in the old military reservation lands in California to the thread of the Colorado River. In return each Indian was to be allotted a small tract of irrigable land out of the ceded lands. The ceded surplus irrigable land was to be sold for the benefit of the Indians. All of the ceded lands "not susceptible of irrigation" were to become a part of the public domain.

At the time the 1894 act was passed, it was contemplated that irrigation facilities would be constructed by a private company. That venture failed. Thereupon, in 1904 Congress made provision for the inclusion of the irrigable lands of the Yuma reservation in the Yuma Federal Reclamation project being undertaken pursuant to the then recently enacted Reclamation Act of June 17, 1902 (32 Stat. 388).

Section 25 of the act of April 21, 1904 (33 Stat. 224) stipulated that certain of the irrigable lands should be allotted to the Indians and the remainder of such lands were to be disposed of under the reclamation law, but with a surcharge for credit to the Indians. The 1904 act left unaffected the stipulation of the 1894 act that extinguished the Indian interest in any non-irrigable lands. Sol. Op. M-28198, January 8, 1936.

We have then a situation in which, if the 1893 agreement and the subsequent acts of 1894 and 1904 embrace accretions to the former reservation lands, to the extent that those accreted lands are themselves irrigable, the Quechan Indians would possess a beneficial interest in them. Conversely, whether or not the accreted lands are within the compass of the agreement and the statutes, the Indians have no interest in non-irrigable lands.

Since disposition of lands which are non-irrigable may be effected free and clear of any claims of the Quechan Indians, whatever may be the outcome of the proceedings in Docket 320 and any subsequent judicial review thereof, the question of irrigability is central to a determination of whether to proceed with the proposed lease.

The act of 1904, as above noted, provides for inclusion of the irrigable lands in the Yuma Federal Reclamation project. Consequently, irrigability is to be determined in accordance with the practices and standards of the Bureau of Reclamation.

By memorandum to you of April 3, copy attached, in pursuance of your request of March 22, the Commissioner of Reclamation reported that the lands included in Parcel Two are non-irrigable. 1/ Consequently,

---

1/ He reached an identical conclusion with respect to an additional parcel embraced in the proposed lease described as Lot 19, S.23, T.8S, R.23W. Since this land lies south of the abandoned 1953 river channel and did not accrete to the former reservation lands, its inclusion in the lease does not present any issue as to Indian claims.

inclusion of Parcel Two in the lease does not present any issue of Indian rights.

Parcel One is considered by the Commissioner to be irrigable. Consequently, if the position of the Quechan Tribe in Docket 320 is upheld, the Quechan Tribe would have an interest in its disposition. A disposition other than as provided in the 1904 act, particularly a disposal as under the proposed lease, would appear to be inconsistent with the Indian interest. That being the case, I cannot recommend the inclusion of Parcel One in the proposed lease.

In light of the foregoing, I recommend that:

(1) Yuma County be advised that Parcel One must be eliminated from the proposed lease, and that it be approved with that modification;

(2) The Indian Claims Commission and the parties in Docket 320 be advised respecting the irrigability determinations of the Commissioner of Reclamation in order that they may be given such consideration as may be warranted in that proceeding; and

(3) By your endorsement in the space provided below, you approve Commissioner Dominy's determinations of April 3, 1968.

Appropriate letters of notification to Yuma County, the Indian Claims Commission, the Department of Justice and the Quechan Tribe are enclosed for your use.

Solicitor

Enclosures

The determinations made by the Commissioner of Reclamation in his memorandum to me of April 3, 1968, are approved.

Secretary of the Interior

See attached list
for distribution

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

IN REPLY REFER TO: 420

APR 1 1968
SOLICITOR

APR 3 - 1968

Memorandum

To: Secretary of the Interior

From: Commissioner of Reclamation

Subject: Status of Land in Township 16 South, Ranges 22 and 23 East, SBM, Under Act of April 21, 1904 (33 Stat. 189)--Yuma Project

Responsive to your March 22, 1968, memorandum subject as above, a field review has been made of the lands discussed in Deputy Solicitor Weinberg's March 21, 1968, memorandum on the same subject.

On the basis of that review and an analysis of available land classification data, we find that land parcel one identified as Sections 25 and 36, Township 16 South, Range 22 East, and Sections 30 and 31, Township 16 South, Range 23 East, San Bernardino Meridian, lying between the upper reservation levee and the Arizona-California state line is irrigable. Land parcel two consisting of Section 36, Township 16 South, Range 22 East, and Section 31, Township 16 South, Range 23 East, San Bernardino Meridian, lying between the upper reservation levee and the present Colorado River channel was also examined. Although arable soil profiles are distributed throughout this parcel, the land is isolated, contains toxic salt concentrations, and is subject to flooding. Accordingly, parcel two is determined to be nonirrigable. The third parcel of land, lying south of the present Colorado River channel in the same sections as parcel two is also held to be nonirrigable. Land in parcel three has few, if any, arable soil profiles, and is characterized by high water tables, and toxic salt and alkali conditions. This parcel is only slightly above the present water surface of the river, and accordingly, is subject to flooding.

During the field examination, review was also made as to the irrigability of Lot 19, Section 23, Township 8 South, Range 23 West, Gila and Salt River Meridian, lying to the south of the abandoned 1953 river channel and included in the lease to the county.

Although soils making up the presently cultivated lands are arable, the parcel is determined to be nonirrigable due to probable frequent flooding, inasmuch as the land lies on the river side of the existing levee.

Please advise if we can be of further assistance in regard to these lands.

(SGD) FLOYD E. DOMINY

cc:
Deputy Solicitor
Assistant Secretary, Water and Power Development

Regional Director, Boulder City, Nevada
Regional Solicitor, Los Angeles, California
Associate Solicitor, Reclamation and Power

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 202

IN REPLY REFER TO:

APR 12 1974

Memorandum

To: Solicitor

From: Associate Solicitor, Indian Affairs

Subject: Boundary of the Fort Mojave Hay and Wood Reserve

I. Facts and Background

A. Statement of the Conflict

The Camp Mojave Military Reserve and the Reserve for Hay and Wood were established "for military purposes" by an Executive Order of President Grant, dated March 30, 1870. The two reserves are located on bottomlands of the Colorado River where the boundaries of the states of Nevada, California and Arizona come together. By an Executive Order dated September 19, 1890, both reserves were transferred to the Department of the Interior to be held in trust as a reservation for the Fort Mojave Indian Tribe. The boundary description of the two reserves as contained in the 1870 Executive Order and the 1890 Executive Order, is as follows:

> Camp Mojave--Commencing at a post marked "U.S." in mound of earth situated N. 83° 31' 37" E., 66.99 chains distant from the flagstaff at the post; thence variation

14° 08' 28" east, south 33° 08' 28" W., 240 chains to a post marked "U.S." in mound of sand; thence north 56° 51' 32" . 232.60 chains to a post marked "U.S." in mound of coarse gravel; thence north 33° 08' 28" E. 240.00 chains to a post marked "U.S." in a mound of coarse gravel, near the west bank of Beaver Lake; thence south 56° 51' 32" E. 232.60 chains to the point of commencement. The said boundaries containing 5,582 acres, 1 rood, 24 perches, a little more or less.

Camp Mojave Hay and Wood Reservation--Commencing at a post marked "U.S." in mound of earth situated south 10° 43' 41" E. 347.52 chains distant from the flagstaff at Camp Mojave and about 20 chains southwest from the point where the road crosses the top of the mesa; thence variation 14° 08' 28" east, south 1° 04' 28" W., 272.50 chains to a post marked "U.S." in a mound of earth near the quartermaster's corrall; thence south 76° 17' 28" W. 228.50 chains to a post marked "U.S." in a mound of earth near the left bank of the Colorado River; thence north 23° 01' 32" W. 362.70 chains to a post marked "U.S." in a mound of earth near the left bank of the Colorado River; thence south 88° 45' 32" E. 369.00 chains to the post at the point of commencement. The said boundaries containing 9,114.81 acres, more or less.1/

The present controversy concerns the western boundary of the Hay and Wood Reserve. The language of the War Department Order, relied upon in the Executive Order, describes the boundaries of each reserve in terms of courses and distances and by reference to the amount of acreage enclosed. Reference in each description is also made to posts placed at each corner. In the case of the Hay and Wood Reserve, the reference to the posts marking the western border locates them as being

"near the left bank [or east bank] of the Colorado River." But the existence of this reference creates an inconsistency in the description; if the courses and distances and acreage specified in the order are followed, the western boundary of the Reserve must necessarily be located west of the flood plain of the Colorado River.

The Fort Mojave Tribe and the Bureau of Indian Affairs construe the order as locating the reservation boundary west of the Colorado River.2/ The Bureau of Land Management interprets it as creating the river as the reservation's western boundary.3/ At issue between the Indians and BLM is the equitable ownership to approximately 3500 acres of land. This issue has not been definitively resolved between the respective Bureaus, and conflicting interpretations and actions have persisted over the years. Accordingly, I recommend that this matter be submitted to the Secretary for final determination.

I have carefully reviewed the factual background of this long-standing controversy and have considered the pertinent legal principles. I recommend that the Secretary issue an order recognizing the equitable title of the Fort Mojave Tribe to the full 9,114.81 acres specified in the 1870 order. The reasons for my recommendation follow.

I. Wheeler Survey

Prior to issuance of the 1870 executive order, the area which became the Hay and Wood Reserve was surveyed by Lieutenant George Wheeler of the U.S. Army.3a/ Lt. Wheeler spent two days surveying the Hay and Wood Reserve in January 1869, and he took notes of his survey.3b/ During the same general period, and in rapid succession, Wheeler also surveyed over a dozen other military reservations in the area.

Thirteen months after his survey was completed,4/ Lt. Wheeler and an assistant -- Mauran -- drew a map depicting the Hay and Wood Reserve. The map was drawn in San Francisco using Wheeler's notes. The 1870 map depicts the boundaries of the Hay and Wood Reserve, and it shows the Colorado River as running along the western boundary of the reserve. Its dimensions, however, and its relationship to Fort Mojave are scaled to conform to the courses and distances and the acreage specified in General Order Number 19. The map therefore depicts a physical impossibility, since a reserve of the dimensions portrayed and traced out at the indicated latitude and longitude could never have been established east of the Colorado River.

Little is known of the circumstances surrounding the actual drawing of the 1870 Wheeler map. The map was drawn by

J. R. Mauran, one of Wheeler's assistants, and it is signed by Lt. Wheeler. Any records describing the creation of the map were probably lost in the San Francisco earthquake. However, it seems likely that the map would have been drawn by reference to Wheeler's notes and to whatever maps the Army Headquarters had at its disposal in San Francisco at that time. All of the maps available to the Army command in San Francisco in 1870 contained erroneous locations of the Colorado River.5/ Hence, the most likely explanation of the 1870 Wheeler map is that Wheeler's survey notes were traced onto a map that erroneously located the Colorado River west of its true longitude.

2. The 1870 Order

The boundary descriptions of the two Fort Mojave reserves appeared first in a communication from the Headquarters of the Military Division of the Pacific in San Francisco to the Adjutant General of the U.S. Army in Washington, D. C.6/ The letter is dated March 12, 1870, and describes eight separate reserves that were surveyed by Wheeler during his assignment in 1868 and 1869. It recommends that all eight be formally sanctioned as military reserves. President Grant's March 30, 1870, Executive Order adopted the descriptions of the reserves therein without change. Since the letter was written after the 1870 map was drawn, the most reasonable conclusion is that the reference to the

left bank of the Colorado River crept into the description at this point. The letter is signed by Major General George Thomas, not by Lt. Wheeler; it is probable that he or his aide inserted the reference to the river in the boundary description after studing the faulty 1870 Wheeler Map.

3. The 1890 Transfer of the Reserve to the Department of the Interior

When the two reserves were transferred to the Department of the Interior in 1890, no new survey was ordered. The Executive Order of September 19, 1890, merely approves the recommendation of the Acting Secretary of War 7/ which recommended that "the Military Reservation of Fort Mojave, Arizona, be transferred and turned over to the Department of the Interior for Indian school purposes". Hence, the cartographic error created in February 1870, received formalization as an executive order in September 1890. The latent ambiguity contained in the Executive Orders went undisvoered until 1903.8/

4. Subsequent Administrative Actions

Since 1903, however, the inconsistencies in the reservation's boundary description have been recognized by agencies of this Department.9/ In that year, the Geological Survey

requested a clarification of the boundary question prior to completing official maps of the area.10/ The BIA responded that the boundary was the Wheeler Line in the western foothills, regardless of the true position of the Colorado River in 1869 or in more recent times.11/ The General Land Office apparently took a contrary position, as it ordered a resurvey of the reservation in 1905. The special instructions issued by the Surveyor General to John Fisher, the surveyor, told him to survey the east, and south boundaries of the Hay and Wood Reserve and to treat the Colorado River as the western boundary of the entire reservation, including Camp Mojave, the Hay and Wood Reserve and the Intermediate tract.12/ [No official plat was prepared adopting this survey. The 1905 survey is significant, however, in that it confirmed the location of the flagstaff used by Wheeler.]

The General Land Office conducted another survey in 1928. The instructions to Surveyor Sidney Blout prejudged the issue in dispute: Blout was directed to determine where the Colorado River flowed in 1869 and establish the western boundary of the Reserve in a line along the eastern bank of the old river course.13/ Blout resurveyed the Hay and Wood Reserve accordingly, and the resultant official plat was adopted by the General Land Office in January 1931.

Several aspects of the Blout survey deserve mention. The new plat reduces the size of the original Wheeler plat by 3,500 acres, which is in excess of 33 percent of the originally specified 9,114.81 acres. Secondly, the courses and distances for the Blout plat do not correspond to those of the Wheeler plat. Thirdly, the truncated Hay and Wood Reserve does not stand in the same relation to the Fort Mojave Military Reserve as did Wheeler's Hay and Wood Reserve. Hence, the Blout survey created a reserve that is substantially different from that described in the Order of 1870.

In 1941, the GLO ordered another survey of the lands that were removed from the Hay and Wood Reserve by the Blout Line.14/ These lands were accordingly surveyed and subdivided by Vander Meer and thereafter, as part of the public domain, awaited disposal under the various public land laws.

Other agencies have accepted the BIA position. The U.S. Geological Survey has subsequent to the 1928 survey treated the western boundary of the Reserve as extending beyond the Colorado River; the 1950 Needles Quadrant of California and Arizona map clearly identifies the full 9,114.81 acres as an Indian reservation.14a/ More recently, the United States took the position before the Supreme Court in Arizona v. California (No. 9 Original, October Term 1959) that "the specification in the Executive

boundaries defined by courses and distance is controlling."15/ This case was commenced to allocate the waters of the lower Colorado River between the states of that region. The United States as a party claimed water rights for federal lands in those states, including the Ft. Mojave Indian Reservation. This required the Special Master to hear evidence as to the size of the Hay and Wood Reserve. While the Special Master held against the contention of the United States on this point and concluded that the 1928 General Land Office survey correctly determined the western boundary of the Hay and Wood Reserve,16/ the Supreme Court rejected his holding on the grounds that it was unnecessary for resolution of the case. Arizona v. California, 373 U.S. 546, 601 (1963). Instead, the Court used the lesser acreage of the Blout Survey for determining the tribe's water allocation, subject to enlargement if the boundary dispute were subsequently resolved in the tribe's favor. 376 U.S. 340, 345 (1964).

The Secretary has not approved the plats created as a result of the Blout survey. In May, 1957, however, the Secretary did approve the Constitution and Bylaws of the Ft. Mojave Tribe, which provide as follows (Article II): ". . . The authority of the Fort Mojave Tribe shall extend to the following land areas:. . . . the so-called Hay and Wood Reserve. . . containing approximately 9,114 acres, more

or less. . ." place substantial weigh on this action by the Secretary (as did the United States in its brief in Arizona v. California,17/). His approval of the tribal constitution and bylaws is neither a ministerial nor an incidental action -- it is required by statute 18/, indicates his non-acceptance of the 1928 survey and a contrary administrative interpretation of the 1870 Executive Order, and in my view supercedes the 1931 GLO approval of the Blout survey because that survey is incompatible with the tribe's constitution and bylaws.

II. Legal Analysis

The legal question to be resolved concerns interpretation of the intent of the 1870 and 1890 executive orders. That intent, it clearly appears, was to create a reserve as surveyed by Lt. Wheeler. I conclude from a detailed analysis of Wheeler's notes and techniques, as follows, that Wheeler surveyed a reserve of 9114 acres, and that the 1870 order intended to establish a reserve of that size. Accordingly, the courses and distances plus the acreage description better describes the intent of the order than does the call to monuments.

A. The Intent of the 1870 Order

Clearly, the drafters of the 1870 order intended to create a reserve as surveyed by Lt. Wheeler. The most likely conclusion - based upon Wheeler's notes, his surveying

techniques and the terrain of the area - is that Wheeler did survey a 9,114.81 acre reserve that spanned the Colorado River.

This conclusion is further substantiated by independent evidence of the understanding in the local community at the time as to where the boundaries of the reserve were. There is correspondence from 1872 referring to timber taken from that portion of the reserve lying west of the Colorado River.18a/

Wheeler's notes taken on the scene at the time when the survey was made, describe the terrain and his techniques, and preserve his crucial notations. At least some of these notes have been recovered from the National Archives and have been thoroughly studied and analyzed. Wheeler's survey technique was to establish corner posts for the reserve and then to determine a course and distance description for the reserve. His determinations were made by taking sitings to the corners from two different points outside the reserve through an instrument from which angular readings could be obtained. Using the angles so read, distances and acreage could be accurately determined by trigonometry.19/

In his notes for the Hay and Wood Reserve, Wheeler describes the establishment of Corner I and the two surveying stations for taking sites to the corners.20/ The actual readings for the sitings from one of these stations to Corners II, III, and IV are recorded. The readings from the other station are not included.21/ There is no description of the location of the Colorado River in relation to the corners, nor is there a description of the land in the vicinity of Corners III and IV.

In the vicinity of the Hay and Wood Reserve, the Colorado River flows through an alluvial plain approximately five miles wide.22/ The plain, or bottomlands, are rich in vegetation. On either side of the plain, the terrain ascends several hundred feet to a sandy, barren plateau. Moving away from the river, the plateau ultimately gives way to rocky foothills and mountains. In contrast to the bottomlands, vegetation on the plateaus and foothills is sparse or non-existent.

Lt. Wheeler established stations from which to survey the Hay and Wood Reserve on the barren plateau to the east of the alluvial plain.23/ Looking west from these points, he sited his instrument at three different corners and recorded the angles to each. Two corners, Numbers III and IV, were marked by fires. The third, Corner II, was marked by a flag.

To establish Corners III and IV as advocated by the BIA, Wheeler's men - but not necessarily Wheeler or Mauran--would have had to cross the Colorado River. The river is not, however, visible from the siting stations on the eastern plateau but is concealed by the dense foliage that carpets the bottomlands. It is probable that Wheeler himself never approached the river in the vicinity of the Hay and Wood Reserve, and that he therefore had no personal recollection of its location.

Corners III and IV were not chosen arbitrarily. While there is no proof as to what caused the selection of these spots, the two points are logical locations for surveyors using Wheeler's techniques. Both points are high enough above the flood plain to make possible their use as siting points. Corner III is 120 feet above the flood plain; Corner IV is 320 feet above the flood plain. Here it must be pointed out that, when siting to fires, it is necessary that the base of the fire be visible in order to obtain an accurate reading.24/ If, instead, fires had been lighted on the east bank of the river, they would have been hidden from the sight of one standing on the eastern plateau. In addition to being of proper height, both corners can be aligned with an identifying feature of the terrain. A line from Corner III through Corner II is in alignment with Boundary Cone, a prominent peak to the east long used as a natural landmark. Corner IV is due west of the Corner I, and, similarly, a line from Corner IV through Corner I is also in alignment with Boundary Cone. A line between Corners III and IV, while enclosing some uplands, is set far enough west so as to include a bulge in the bottomlands. It is no further west than necessary to include all of the bottomlands located between the north and south boundaries of the Reserve.25/

Wood Reserve mo probably went as follow 26/ Wheeler and his party went south of the fort along an established road on the plateau to the east of the river. At a point where the road began to descend the plateau into the river's bottomlands, Wheeler established his first siting station. From there and a second nearby station, he took sitings to the flagstaff at the fort in order to establish his position. He then measured off a distance of 24 chains down the plateau and into the bottomlands to establish Corner I. He then returned to the plateau and established a third siting station. Next he sent some of his men across the river to set up fires at what would become Corners III and IV. His men were to locate Corners III and IV by reference to Corners I and II and to natural terrain features. Wheeler then took readings to Corners II, III and IV from stations 2 and 3. Subsequently, he compared readings taken at Station 2 (of which there is no record) to readings taken at Station 3 and, using trigonometry, computed the courses and distances contained in the boundary description.

The available evidence supports this conclusion. The plateau and the road in the vicinity of Corner I have been located and they conform to the sketches in Wheeler's notes. The original flagstaff at Fort Mojave was relocated by the 1905 Fisher survey. Using the readings in Wheeler's notes,

his siting stati s on the plateau can be r stablished by reference to the flagstaff. Sitings from these stations to Corners II, III, and IV conform to the readings in Wheeler's notes.

A BIA survey team using modern intrumen's has resurveyed the reserve following Wheeler's notes.27/ The resultant plat is identical to the plat on the Wheeler map, and angular readings and terrain features correspond to those in Wheeler's notes. The acreage within this plat is 9114 acres.

B. The Call to Courses and Distances Plus Area Should, In these Circumstances, Prevail Over The Call to Monuments

While it is true that a call to monuments in a boundary description should generally prevail over courses and distances, the latter must prevail over monuments in cases where the courses and distances better indicate the intent of the grantor.28/ As the Supreme Court has stated:

> It is true that, as a general rule, monuments, natural or artificial, referred to in a deed control, on its construction, rather than courses and distances; but this rule is not inflexible. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. For instance, if the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify and render certain the land which the sheriff intended to convey, it would certainly be absurd to retain the false call, and thus defeat the conveyance. (Emphasis supplied.) White v. Luning, 93 U.S. 514, 524 (1876).

Continuing, the Court noted:

> "It would therefore be manifestly wrong, not to say absurd, to retain the call for the fence, and reject the call for course and distance. The reason why monuments, as a general thing, in the determination of boundaries control courses and distances, is, that they are less liable to mistakes; but the rule ceases with the reason for it. If they are inconsistent with the calls for other monuments, and it is apparent from all the other particulars in the deed that they were inadvertently inserted, the reason for retaining them no longer exists, and they will be rejected as false and repugnant." (Emphasis supplied)

Other courts have held that preference for monuments cannot be applied where the existence of the monument cannot be established and proved. Hanson v. Red Rock, 4 S. Dak. 358, 57 N. W. 11 (1893). Further, where the monument referred to is a natural object and its position or shape has changed over time, the boundary described by courses

and distances and acreage should prevail. Smith v. Hutchison, 104 Tenn. 394, 58 S.W. 226 (1900). See also Luginbuhl v. Hammond, 179 Cal. App. 2d 350, 3 Cal. Rptr. 582 (1960).

In this case, none of the posts referred to as monuments in the 1870 Executive Order has ever been discovered and the Colorado River is a natural monument which has undergone radical changes over time.29/ The rules of comparative dignity of calls in a boundary description are rules of construction adaptable to the circumstances and the intention of the conveying instrument. United States v. Redondo Development Company, 254 Fed. 656 (8th Cir. 1918); Ewart v. Squire, 239 Fed. 34 (4th Cir. 1916). They are not to be applied so as to defeat the intent of the grantor. White v. Luning, 93 U.S. 514 (1876).

The intent of the 1870 Executive Order is clear upon reference to the specification within the Order of a total quantity of 9,114.81 acres. When there is doubt of its true description, designation of quantity may be properly considered, Chapman & Dewey v. St. Francis, 232 U.S. 186, 197 (1914). Field v. Columbia, Fed. Case No. 4764, 4 Sawy. 523 (1864). And it may have controlling weight, particularly if there is uncertainty in the specific description. Montana Mining Co. v. St. Louis Mining & Milling Co., 183 Fed. 51 (9th Cir. 1910).

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The Supreme Court in Ainsa v. United States, sustained the all-controlling factor of intent saying:

> So monuments control courses and distances, and courses and distances control quantity, but where there is uncertainty in specific description, the quantity named may be of decisive weight, and necessarily so if the intention to convey only so much and no more is plain. 161 U.S. 208, at 229 (1895).30/

Nor does the addition of the words "more or less" detract from the significance of the specification within the Executive Order of a quantity of 9,114.81 acres. Used in connection with quantity, these words are merely words of safety and precaution, intended to cover some slight or unimportant inaccuracy. 6 Thompson on Real Property, Sec. 3353. The Supreme Court has specifically rejected the words "a little more or less" when used in a grant which clearly expresses the quantity. United States v. Fossat, 61 U.S. (20 How.) 413, 427 (1957).

In interpreting the Executive Orders of 1870 and 1890, moreover, any ambiguities should be construed in favor of the Mojave Indians. It is well settled that in any treaty or agreement with an Indian tribe, ambiguous language is to be construed in favor of the Indians or as the Indians would have understood it. Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

Nor is this rule of construction strictly limited to interpretations of treaties. The Supreme Court has stated in a case involving an executive agreement:

> "But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases." Choate v. Trapp, 224 U.S. 665 at 675 (1912).

The same rule applies when construing statutes that apply to Indians. Menominee Tribe v. United States, 391 U.S. 404 (1968); Squire v. Capoeman, 351 U.S. 1 (1956); United States v. Santa Fe Pac. R., 314 U.S. 339, (1941); Bennett County v. United States, 394 F. 2d 8 (8th Cir. 1968); Drummond v. United States, 131 F.2d 568 (10th Cir. 1942).

Reid Peyton Chambers
John Wyeth Griggs
Santa Fe

Copy to:

Mr. Lindgren
Mr. Striegel
Commissioner Thompson
Mr. LaFollette Butler
Mr. Veeder
Mr. McHale

1/ The 1870 Executive Order included within the military reserve:

> "The intermediate tract lying between the Hay and the Post Reservation, bounded on the West by the Colorado River and on the East by a line running from Station 1 of the Hay and Wood Reserve to Station 1 of the Post Reserve."

Inadventently, this intermediate tract was not expressly transferred by the 1890 order. It was, however, specifically included within the Ft. Mojave Indian Reservation in 1903. Executive Orders Relating to Indian Reservations: From May 14, 1855, to July 1, 1912, p. 12 (1912).

This "intermediate tract" clearly belongs to the tribe.

2/ Memorandum, March 14, 1973, BIA Area Director Phoenix to Commissioner, Indian Affairs; Memorandum, August 28, 1973, Assistant to the Secretary for Indian Affairs to the Solicitor.

The efforts of the Mojave Tribe to have their equitable title to this land recognized have been of long standing. Beginning in 1910, the State of California petitioned the General Land Office to obtain title to some of the bottomlands located on the western bank of the Colorado River and within the Hay and Wood Reserve as claimed by the tribe and BIA. The state claimed these were public lands, and subject to claim by it pursuant to the Swamp and Overflowed Lands Acts of 1850 and 1866. 43

U.S.C. § 987. While the state's petition was rejected in 1910, because GLO acknowledged the western boundary of the reservation was unsettled, the State reasserted its claim after the 1928 Blout survey. This led ultimately to an administrative adjudication in which the Tribe intervened. 8 IBLA 164 (1972).

The results of this determination are inconclusive for present purposes. The Board held against the State on the ground that the lands were not "swamp and overflowed" lands under the act; but did not pass on the tribe's claim to equitable title. The BIA, however, resurveyed the land and its expert witness, Rupkey, testified in the tribe's behalf at the hearing. His testimony is referred to in the footnotes herein as "Rupkey Testimony."

3/ The latest memorandum espousing this position is from Clark L. Gumm to Members of the Fort Mojave Task Force, dated May 18, 1971.

3a/ The lands within the Mojave Valley, including the lands presently in dispute, were part of the lands aboriginally possessed by the Mojave Tribe, and were held by the tribe in "Indian title." 7 Ind. Cl. Comm. 219, 253.

3b/ Lt. George M. Wheeler, Survey Notes 1868-1869, Books Nos. 2, 10, National Archieves, Record Group 77, Records of the Office of the Chief of Engineers.

4/ During these thirteen months, Wheeler was occupied on a grueling exploratory mission in southern Nevada unrelated to his surveys in 1868 and early 1869. William H. Goetzmann, Exploration and Empire (Alfred A. Knopf 1966), p. 399, 468.

5/ The maps of the Lower Colorado River available in 1870 to the creators of the Wheeler Map were all slightly erroneous. Three maps known to have been available to the Army in San Francisco at that time have been recovered from the National Archives. The first is the result of an 1855 survey of the Second Standard Parallel North in California by Henry Washington. This line runs east and west terminating in the vicinity of Corner IV of the Hay and Wood Reserve. It is known that Mr. Washington used a defective surveyor's chain so that all his measured distances were reported too short. Rupkey Testimony supra, Tr. p. 1394. Hence, in reporting the location of the Colorado River, Washington locates it two and one-half miles west of where it actually was in 1855. This would place the river where it never could have been in the foothills west of the alluvial plain.

An extensive fi d survey of the Lower Co orado was undertaken by Lt. J. C. Ives in 1858. Goetzmann, Army Exploration In the American West, 1803-1863 (Yale 1959), p. 380-393. The National Archives contains two maps that were prepared as a result of this survey. The first map, known as the Ives-Churchill map, was not published as part of the Ives report. It does, however, locate the Colorado River approximately one and a half miles west of its true location. Rupkey Testimony, supra, Tr. p. 1394. See also Memorandum from Clark L. Gumm to members of the Fort Mojave Task Force, May 18, 1971 (hereafter "BLM Memorandum") p. 5; State of California, 8 IBLA 164, 192-203 (1972).

The second map, dubbed the Ives map of 1861, is the one that accompanies Ives' final report. It depicts the natural contours in greater detail than the first map, and it contains a correction for latitude and longitude. Despite the relocation of the Lower Colorado further eastward, however, the second map still contains errors with respect to the river's proper location. Memorandum from Clark L. Gumm, Chief, Division of Cadastral Survey to Regional Solicitor, Los Angeles, California, July 22, 1971; See also U.S. Geological Survey, The Deposits of the Colorado River on the Fort Mojave Indian Reservation in California 1850-1969 (1970) n. 3, p. 10. Hence, the Hay and Wood Reserve plotted on either of these maps lies to the east of the Colorado River.

Pacific to Adjutant General, U.S. Army, Washington, D. C. March 12, 1870, National Archives, Record Group 49.

7/ The letter is from the Acting Secretary of War, L. A. Grant, to the President, dated September 18, 1890. This type of executive order vests the same type of equitable title in the Indians as a more formal definitive executive order. Department of the Interior, Federal Indian Law (1958) p. 620.

8/ Letter from Acting Director, Geological Survey to the Secretary of the Interior July 9, 1903, National Archives, Record Group No. 48.

9/ I attach relatively little weight to correspondence and documents that do not show any awareness of the potential for conflicting interpretations. For example, the first Reservation Superintendent, after the land was transferred to this Department, stated in a letter to the Commissioner of Indian Affairs dated December 8, 1891, that "the Hay and Wood Reservation is located . . . entirely on the East Bank of the Colorado River. . . . The Colorado River. . . is the western boundary of the Hay and Wood Reservation." However, the same letter states that the total acreage of the Hay and Wood Reservation is "9,114.81."

10/ William H. Goetzmann, Army Exploration in the American West, 1803-1863. (Yale 1959) pp. 380-393.

11/ Letter from Commissioner of Indian Affairs to the Secretary of the Interior, July 16, 1903, National Archives, Record Group No. 48. This BIA position may not have been consistently held throughout all the intervening 70 years. For example, the Commissioner of Indian Affairs concurred in a February 27, 1929, letter from the Acting Assistant Commissioner of the General Land Office to the Secretary of the Interior, which letter stated (based on a 1928 GLO survey to be discussed infra) that the western boundary as established by the courses and distances in the 1870 Wheeler Map was erroneous.

12/ See Memorandum from Area Director to Commissioner of Indian Affairs, March 14, 1973, supra Note 1 attachment Exhibit C.

13/ Id., Attachment Exhibit D. The Instructions, dated January 7, 1928, referred to "a small topographic map accompanying" them and stated:

> It will be observed that corners III and IV fall on ground so high as to preclude any possibility of the river having flowed to the west thereof in 1869. This condition can only be explained by assuming serious errors in the lengths

reservation for hay and wood. You will, therefore, run said boundaries on their record courses but only so far to the west as will place the west boundary in a position that conditions on the ground indicate as its probable position in 1869.

14/ State of California, 8 IBLA 164, 183 (1972).

14a/ A later map covering a much larger area and entitled "Western United States, 1:250,000, Needles," does show the western boundary as being in accordance with Blout's survey. This later map serves only to prove the inconsistency with which one branch of the Department has dealt with the issue. Geological Survey has two current maps which cover the Fort Mojave Indian Reservation, the 1950 Needles Quadrant and the above referenced map. Yet, the maps place the boundary in different places.

15/ Memorandum of the United States Re Fort Mohave Indian Reservation Boundary, p. 1.

16/ Special Master's Report, pp. 282-83. The Special Master premised his conclusion on the conclusiveness of the GLO survey and its immunity to judicial review. However, any lack of judicial power to review the survey is irrelevant for the present purposes, because the Secretary of the Interior unquestionably has the power to set aside erroneous surveys by the GLO. Knight v. United States Land Association, 142 U.S. 161 (1891).

The Special Master also concluded that the 1928 survey correctively determined the boundary with respect to monuments as against courses and distances and area. Special Master's Report pp. 285-287. For the reasons discussed infra, I have concluded that the Special Master was in error.

17/ Memorandum of the United States Re Fort Mohave Indian Reservation Boundary. p. 10.

18/ 25 U.S.C. § 476.

18a/ Letter from Captain Pond, Camp Mojave to Headquarters, March 24, 1872, National Archives, Record Group 393, Ft. Mojave, Arizona, Letters sent.

19/ Rupkey Testimony, supra n.1, Tr. pp. 1391-1395.

20/ Survey Notes, supra, n.3.

21/ Not all of the notebooks used on the Wheeler expedition were available from the National Archives. It is believed that one of these, kept by either Wheeler or one of his colleagues, records the missing readings from Station No. 2.

22/ State of California, 8 IBLA 164, 181-182; See also U.S. Geological Survey, the Deposits of the Colorado River on the Fort Mojave Indian Reservation in California, 1850-1969 (1970) p. 8.

23/ Survey, Notes, supra., n. 3.

24/ See Memorandum from Area Director, supra, Note 1, Attachment p. 16.

25/ The facts of the terrain features are taken from Geological Survey maps for the Needles Quadrant, Calif. Arizona (1950) and the Needles Quadrant, Arizona; and from exhibits introduced by the BIA for the hearings in State of California, 8 IBLA 164 (1972).

26/ Rupkey Testimony, supra, no. 1.

27/ This resurvey was accomplished as part of the preparation of the case of the Ft. Mojave Tribe in State of California, IBLA 70-150, the decision of which is reported in 8 IBLA 164 (1972).

28/ All authorities on the subject support these propositions. Tiffany says: "In the case of a description by boundaries, as in other cases, the intention of the grantor, as inferred from the terms of the description, is the controlling consideration, and any rules which the courts may have formulated as to the relative importance of various elements of the description are merely intended as aids in arriving at this intention." 4 Tiffany, 3d ed., Sec. 993, pp. 94-95.

Thompson in his works on Real Property, emphasized the importance of the intention of the parties formulating the document containing the description, in these words: "* * * the general rules as to the greater or lesser degree of weight and control to be given to one form of description as compared with another are not absolute but are mere aids to be used in the construction of the deed to discover the real intent of the parties, such intent being the thing which governs where there is latant ambigutyi": 6 Thompson on Real Property, 1962 Replacement, Sec. 3021, p. 442.

29/ It is well established that for a call to a natural object to be controlling, it must be a locative call and not merely a descriptive or directory call. Locative calls are defined as specific calls, descriptions, or marks of location, referring to landmarks, physical objects, or other points by which the land can be exactly located and identified. Descriptive or directory calls are those which merely direct the neighborhood wherein the different specific calls may be found. 11 Corpus Juris Secundum, Boundaries, Sec. 4. The reference to a marked post in a mound near the river in 1870 manifestly did no more than describe generally the neighborhood of the boundary corner.

The indefiniteness of "near" is well illustrated by the case of Creech v. Johnson, 116 Ky. 441, 76 S.W. 185 (1903)

Cumberland Gap ' The Court there, In c struing the patent, "reversed" the calls so as to give effect to the intent to grant a specified number of acres, even the result was to locate the corner in question five miles from Cumberland Gap, the Court holding that such location might reasonably be spoken of in the survey, as "near Cumberland Gap." See also Mizell v. Simmons, 79 N.C. 182 (1878), to the effect that courses and distances must prevail over a call "to or near" the head of a certain creek.

More specifically, the California Court of Appeals has ruled that the expression "near the river" is not the equivalent of a description reading "at the river bank" and refused to hold that that language fixed the river bank as a controlling monument. San Pedro, L.A. & S.L. R. Co. v. Simmons Brick Co. 45 Cal. App. 57, 187 P. 62 (1919).

38/ Accord: Security Land & Exploration Co. v. Burns, 193 U.S. 167, 179-180 (1904).

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California and the COACHELLA VALLEY WATER DISTRICT, a public agency of the State of California, Plaintiffs, v. THE UNITED STATES OF AMERICA, JAMES WATT, as Secretary, United States Department of the Interior, Defendants.	CASE NO. 81-0678-GT(M) FIRST AMENDED COMPLAINT FOR REVIEW OF ADMINISTRATIVE ACTION, FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

Plaintiffs allege:

INTRODUCTION

1. Plaintiff, The Metropolitan Water District of Southern California (hereinafter referred to as "Metropolitan") seeks review of 3 orders of the defendant Secretary of the

Interior (hereinafter referred to as "Secretary") purporting to establish the boundaries of the reservations of the Fort Yuma (Quechan), Fort Mojave and Colorado River Indian tribes (hereinafter sometimes referred to as the "three tribes").

2. Metropolitan further seeks a declaration that certain lands of the bed of the Colorado River within the State of California, hereinafter described, which either the secretarial orders complained of purport to place within the boundaries of the reservations of the three tribes or are otherwise claimed by the United States to be within said reservations, are lands owned by the States of California and Arizona, respectively, in their sovereign capacity and are not a part of the reservations of the three tribes.

3. Plaintiff, the Coachella Valley Water District (hereinafter referred to as "Coachella") seeks a review of the order of the Secretary purporting to establish the boundary of the reservation of the Fort Yuma tribe only.

4. Coachella further seeks a declaration that certain lands of the bed of the Colorado River within the State of California, hereinafter described, which the order of the Secretary purporting to establish the boundary of the Fort Yuma Indian Reservation, purports to place within the boundaries of the Fort Yuma Indian Reservation, are lands owned by the State of California in its sovereign capacity and are not a part of the Fort Yuma Indian Reservation.

5. Plaintiffs challenge defendants' orders and seek declaratory and injunctive relief.

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JURISDICTION AND VENUE

6. This court has jurisdiction pursuant to the Administrative Procedure Act, 5 U.S.C. §§701-706; 28 U.S.C. §1331 (Federal Question); and 28 U.S.C. §2201 (Declaratory Judgment).

7. Venue is proper in this court pursuant to 28 U.S.C. §1391(e)(3).

8. Plaintiffs have exhausted all administrative remedies and have no adequate remedy at law.

PARTIES

9. Metropolitan is a public agency established pursuant to the Metropolitan Water District Act (Cal. Stats. 1969, Ch. 209, as amended; Deering's Water Uncodified Acts 9129(b); West's Water Code Appendix 109-1) having its principal place of business at 1111 Sunset Boulevard, Los Angeles, California.

10. Metropolitan is engaged in the development, storage, and delivery of water at wholesale to its 27 member public agencies for municipal and domestic use. The member public agencies are all located in Southern California and consist of 14 cities, 12 municipal water districts and a county water authority. Metropolitan's service area extends into the counties of Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura and encompasses a population in excess of 12 million persons, approximately one-half the population of the State of California.

11. Coachella (formerly known as the Coachella Valley County Water District), is a public agency of the State of California, organized and existing pursuant to the provisions of

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the County Water District Law (Section 30000, et seq. of the Water Code) having its principal office at Coachella, California.

12. The territory of Coachella consists of approximately 650,000 acres principally being lands within Riverside County, California, but also including lands within Imperial County, California, and San Diego County, California. 5 cities are included within the territory of the District. The public activities of Coachella include the provision of irrigation and domestic water, agricultural drainage, water conservation, sanitation service and flood control. One of the principal activities of Coachella is to provide irrigation water to approximately 60,000 acres of agricultural lands.

13. Defendant, James Watt, is the Secretary of the Interior and is charged by statute with the supervision and management of the United States Department of the Interior.

14. The United States is the owner of and trustee for the reservations of the three tribes and therefore has an interest in this litigation. The Secretary of the Interior acts on behalf of the United States in administering these lands.

15. The United States, acting through the Secretary of the Interior, enters into Colorado River water delivery contracts under authority of the Boulder Canyon Project Act. (45 Stat. 1057 (1928) as amended; 43 U.S.C. §§617-617t.) The Act prohibits the use of stored water, except by such contracts. Section 5 of the Act, 43 U.S.C. §617(d), provides, in pertinent part, as follows:

> "The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river . . . as may be agreed upon,

> for irrigation and domestic uses . . . . No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

16. A major portion of Metropolitan's water supply is obtained pursuant to a contract that Metropolitan has executed with the Secretary of the Interior, in accordance with the Boulder Canyon Project Act. That contract, dated April 24, 1930, provides, in part, for delivery of a permanent Colorado River water supply at Parker Dam for the use of Metropolitan.

17. Metropolitan's diversion and use of Colorado River water results in the principal municipal and domestic use of Colorado River water within the State of California.

18. All of the irrigation water supplied by Coachella is obtained pursuant to a contract that Coachella executed with the Secretary of the Interior on October 5, 1934, in accordance with the Boulder Canyon Project Act. That contract provides, in part, for delivery of Colorado River water at Imperial Dam for the use of Coachella.

19. Coachella's diversion and provision of Colorado River water for irrigation constitutes the principal irrigation water supply within the Coachella Valley Water District.

20. The Colorado River water delivery contracts entered into by the Secretary of the Interior are subject to and controlled by the Colorado River Compact entered into among the states of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, as approved by Section 13(a) of the Boulder Canyon Project Act. The Compact, among other matters, sets

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forth a division of the waters of the Colorado River between the Upper Basin (specified portions of the states of Arizona, Colorado, New Mexico, Utah and Wyoming) and the Lower Basin (specified portions of the states of Arizona, California, Nevada, New Mexico and Utah). Pursuant thereto, the Compact, in part, apportions to the Upper and to the Lower Basins, respectively, the beneficial consumptive use of 7.5 million acre-feet of water per annum.

21. On March 9, 1964, the United States Supreme Court decreed in Arizona v. California, 376 U.S. 340, 342, that if sufficient mainstream water is available, the states of Arizona, California and Nevada would be entitled to 7.5 million acre-feet of water per year. Of that 7.5 million acre-feet of water, California is apportioned 4.4 million acre-feet of water per year. The decree further provides that in the event the Secretary determines surplus water is available below Lee Ferry, California is entitled to one-half of said surplus.

22. Under the authority granted by Arizona v. California, supra, the Colorado River Basin Project Act (43 U.S.C. §1501, et seq. (1968)) and the 1970 Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs (Vol. 35, No. 112 Federal Register (June 10, 1970)), promulgated pursuant to the Colorado River Basin Project Act of September 1968, the Secretary may release surplus and/or unused apportioned water. Pursuant thereto, the Secretary and agencies of the State of California have entered into contracts which allow those agencies to divert in excess of the 4.4 million acre-feet of water per year. When

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the Central Arizona Project commences operation in 1985, the operating criteria for the Colorado River reservoirs, provide that California may be restricted to its basic apportionment of 4.4 million acre-feet of water per year, plus one-half of any surplus waters available as determined by the Secretary.

23. The priorities of the California diverters are as set forth by the Secretary of the Interior in the 1931 General Criteria and in the contracts executed with each of said diverters. The first three priorities, in which Metropolitan has no interest, total 3.85 million acre-feet of water per year. The fourth priority, held by Metropolitan, is for 550,000 acre-feet of water per year, for use on the Coastal Plain of Southern California. The fifth priority, also held by Metropolitan, is for 662,000 acre-feet of water per year for use on the Coastal Plain of Southern California. Metropolitan has no interest in the remaining priorities. Thus, to the extent that water is available, Metropolitan is entitled to divert a total of 1,212,000 acre-feet of water per year. However, when California's entitlements are restricted to 4.4 million acre-feet of water per year, Metropolitan will be limited to a diversion of 550,000 acre-feet of water per year less any other diversions by persons or entities that have higher priorities than Metropolitan.

24. Coachella is one of the parties entitled to water under the third priority, the other principal party being the Imperial Irrigation District. The first three priorities, sometimes entitled "agricultural priorities", have a total entitlement of 3.85 million acre-feet of water annually. No

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specific number of acre-feet of water is allocated in each of such priorities, the limitation of each priority being based on area of use. Pursuant to an Agreement of Compromise under date of February 14, 1934, the Imperial Irrigation District has a prior right to the entitlement to water in the third priority over Coachella. Thus Coachella has the last right to water under the agricultural priorities and must suffer any diminution of the 3.85 million acre-feet annual entitlement. Currently, the agricultural water use by those agencies in the agricultural priorities exceeds 3.85 million acre-feet annually. This is possible because there is currently surplus water available. Such surplus water may not be available, however, when the entitlement of the California agencies is restricted to 4.4 million acre-feet annually.

25. The second priority is to the Yuma Project of the United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California. Presently, approximately 15,000 acres are being irrigated in the Yuma Project, including approximately 7,000 acres within the Fort Yuma Indian Reservation (Quechan Reservation). To the extent the Fort Yuma Reservation is enlarged by action of the Secretary of the Interior, there exists a possibility that additional water under the second priority will be put to use on such additional lands. This would reduce the water supply available to Coachella whose entitlement is in the last agricultural priority, that is, the third priority.

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26. Pursuant to Arizona v. California (1963) 373 U.S. 546, 600-601, 10 L.Ed.2d 542, each of the three tribes is entitled to divert Colorado River water on the basis of practicably irrigable acreage on their reservations with a priority date for said diversion for each parcel of each reservation the date each such parcel was established as part of the reservation. Each of the reservations of the three tribes was created prior to Metropolitan's date of priority.

27. Moreover, the 1964 decree in Arizona v. California (1964) 376 U.S. 340, 346, provided that the amount of water legally diverted pursuant thereto to the reservations of the three tribes is to be charged against the water appropriation of each state on the basis of the number of practicably irrigable reservation acres within each state.

28. The 1964 decree in Arizona v. California, supra, at 344-345, sets forth the interests of the three tribes. Those interests were subsequently specified in Article II(A) of the January 9, 1979 supplemental decree Arizona v. California (1979) 439 U.S. 419, 428, 58 L.Ed.2d 627, wherein the court provides as to the interests of the three tribes in California, as follows:

Defined Area of Land	Annual Diversions (acre-feet)	Net Acres	Priority Date
23) Yuma Indian Reservation	51,616	7,743	Jan. 9, 1884
24) Colorado River Indian Reservation	10,745	1,612	Nov. 22, 1873
	40,241	6,037	Nov. 16, 1874
	3,760	564	May 15, 1876
25) Fort Mojave Indian Reservation	13,698	2,119	Sept. 18, 1890

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To the extent those rights relate to acreage in California, those entitlements for diversion of Colorado River water are prior in right and time to those of Metropolitan.

29. Any purported changes in the boundaries of the three tribes which add practicably irrigable acreage to the respective reservations of the three tribes within California, and purport to be retroactive to the date such acreage was established as a part of the reservation, would add to the quantity of Colorado River water which each tribe would be entitled to divert from the Colorado River with a priority date which precedes the priorities of Metropolitan. Such diversions would diminish the quantity of water Metropolitan is entitled to divert each year from the Colorado River in any year in which California is restricted to 4.4 million acre-feet of water or less.

30. The issues as to the Fort Mojave and Colorado River Indian Reservation boundaries were raised in the original proceedings in Arizona v. California (1963) 373 U.S. 546, 10 L.Ed.2d 542, where the Special Master resolved them generally in favor of the California Parties. However, the Supreme Court concluded that there was no necessity to make such boundary determinations at that time, but left the issue open for future adjudication. Subsequently, the United States moved to reopen and modify the decree in Arizona v. California and requested, in part, a determination as to the number of practicably irrigable acres in each of the reservations based upon the boundaries as defined by the secretarial orders herein challenged. In these pending proceedings, the Special Master has declined to determine the

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boundaries of the reservations of the three tribes and instead has assumed that for purposes of water allocations, the boundaries as defined by the secretarial orders herein challenged were proper, and indicated that adjudication of the boundaries should be determined in a separate proceeding. (Arizona v. California, October Term 1979, No. 8, Original, Memorandum and Report on Preliminary Issues, Elbert P. Tuttle, Special Master, August 28, 1979, pp. 36-41.)

31. The secretarial orders complained of herein purport to increase the size of the respective reservations of the three tribes retroactively to the date of the creation of each reservation with the result of adding acreage within the State of California which may be regarded as practicably irrigable to each reservation. Therefore, they directly adversely affect the interests of Metropolitan.

32. The secretarial orders complained of herein purport to include land of the bed of the Colorado River within the reservations of the three tribes. In addition, irrespective of the secretarial orders complained of, the United States claims land of the bed of the Colorado River within the reservations of the three tribes. The United States holds land under navigable waters in trust for future states, to be granted to such states when they enter the Union and assume sovereignty on an equal footing with the other states. Consequently, these lands of the bed of the Colorado River belong to the States of California and Arizona, respectively. The secretarial orders complained of herein and the claims of the United States include such lands within the

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reservations of the three tribes with the result of adding lands in the State of California to each reservation claimed to be or which may be claimed to be practicably irrigable with a priority date prior to Metropolitan and Coachella, therefore directly, adversely affecting the interests of Metropolitan and Coachella.

FIRST CLAIM FOR RELIEF

(Fort Yuma Indian Reservation)

33. The Fort Yuma (Quechan) Indian Reservation was established by Executive Order dated January 9, 1884. A copy of the Executive Order is attached hereto, incorporated herein by this reference and marked as Exhibit 1.

34. Title to certain reservation lands was immediately and unconditionally ceded to the United States by virtue of a negotiated 1893 cession agreement with the Quechan Indian Tribe and an 1894 Act of Congress ratifying the agreement. (28 Stat. 286, 332.)

35. Three Department of Interior Solicitors' opinions over a 41-year period (Margold--1936, Weinberg--1968, Austin--1977) rejected the Indians' claims to reservation boundaries which included the land ceded by the 1893 agreement.

36. On December 20, 1978, Secretary of the Interior Cecil D. Andrus issued an order declaring the 1893 cession agreement and the 1894 ratifying statute of no effect, due to the alleged failure of the United States to fulfill the alleged conditions of the 1893 agreement. Copies of the Order and the Solicitor's Opinion upon which the order is based, are attached hereto, incorporated herein by this reference and marked,

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respectively, Exhibits 2 and 3. Therein, the Secretary purported to restore the boundaries of the Fort Yuma Indian Reservation to the boundaries as they were created by Exhibit 1 hereof.

37. The December 20, 1978 order of the Secretary is inconsistent with past secretarial orders and Department policy and action.

38. The December 20, 1978 order of the Secretary is not based upon substantial evidence and incorrectly interprets the 1893 agreement and 1894 ratifying statute. It is arbitrary, capricious and unreasonable, and therefore is illegal and void.

39. By issuing the December 20, 1978 order, the Secretary has acted and continues to act outside his statutory powers to the detriment of plaintiffs.

40. An actual controversy has arisen and now exists between plaintiffs on the one hand, and the United States and the Secretary on the other hand, concerning the location of the boundary of the Fort Yuma Indian Reservation. A fortiori, an actual controversy has arisen and now exists between plaintiffs on the one hand, and the United States and the Secretary on the other hand, as to the Colorado River water entitlement of the additional land encompassed by the December 20, 1978 order. As a result of that order, the United States, the Secretary, and the Quechan Tribe through the United States, are claiming that those additional lands are a part of the reservation, some of which they allege are practicably irrigable and therefore entitled to additional water rights.

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41. Plaintiffs desire a judicial determination and declaration as to the boundaries of the Fort Yuma Indian Reservation for the purpose of proper allocation of Colorado River water pursuant to the Boulder Canyon Project Act and Arizona v. California, supra, at 546.

42. Plaintiffs further desire a mandatory injunction to require the Secretary to set aside the December 20, 1978 secretarial order at issue and to prevent the unauthorized use of Colorado River water on any land declared to be outside the reservation boundaries.

43. The declaration and injunction are necessary and appropriate at this time so that plaintiffs can protect their rights to Colorado River water and can determine what portion, if any, of their existing Colorado River entitlement may be reduced in the future by valid Indian reservation diversions. Such information is vital, at this time, to enable plaintiffs to make projections of the availability of water to meet the future needs of their service areas.

SECOND CLAIM FOR RELIEF

(Fort Yuma Indian Reservation)

44. Plaintiffs incorporated by this reference each and every allegation contained in paragraphs 1 through 36 inclusive hereof.

45. The December 20, 1978 secretarial order, Exhibit 2 hereof, purporting to restore the boundaries of the Fort Yuma Reservation purports to include certain lands of the bed of the Colorado River in its last natural course as a part of the Fort Yuma Indian Reservation.

46. Plaintiffs are informed and believe and thereon allege that the State of California is the owner of certain portions of the west half of the bed of the Colorado River in its last natural course. Therein, the lands more particularly described as:

Parcel Yuma A: Beginning at a point in the mid-channel of the abandoned bed of the June 1920 Colorado River on the Arizona-California state boundary in Section 30, Township 16 South, Range 23 East, S.B.M. (A-1); thence upstream along the mid-channel of said abandoned 1920 river channel to a point where it again intersects the California-Arizona boundary in Section 7, Township 8 South, Range 22 West, G. & S.R.M. (A-2); thence east along the state boundary to the mean high-water line of the California bank of the abandoned bed of the said 1920 river channel (A-3); thence downstream along the mean high-water line of said bank of the abandoned 1920 river channel to a point where it intersects the California-Arizona state boundary in Section 30, T. 16 S., R. 23 E., S.B.M. (A-4); thence easterly along said state boundary to its intersection with the mid-channel of said abandoned river bed, the point of beginning (A-1).

Parcel Yuma B: Beginning at a point where the present Arizona-California state boundary intersects the mid-channel of the abandoned bed of the 1920 channel of the Colorado River, immediately prior to the June 1920 avulsive change in the course of said river, in section 23, T. 16 S., R. 23 E., S.B.M. (B-1); thence upstream along said mid-channel of said abandoned river bed to a point where it intersects with the easterly extension of the north line of Section 15, T. 16 S., R. 23 E., S.B.M. (B-2); thence westerly along said extension of the north line of said Section 15 to the mean high-water line of the west bank of said abandoned 1920 channel of said river (B-3); thence downstream along said mean high-water line of the west bank of said abandoned 1920 channel of the Colorado River to its intersection with the present California-Arizona state boundary (B-4); thence easterly along said state boundary to its intersection with the mid-channel of said abandoned 1920 bed of said river, the point of beginning (B-1).

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Parcel Yuma C: Beginning at the point where the mean high-water line of the west bank of the Colorado River, as surveyed by the U. S. Geological Survey in 1902-03, intersects the easterly portion of the northerly boundary of the Fort Yuma Indian Reservation (C-1); thence southeasterly along the easterly portion of said northerly boundary to its intersection with the mid-channel of the 1902-03 course of the Colorado River (C-2); thence downstream along said mid-channel of the 1902-03 Colorado River to its intersection with the easterly extension of the north line of Section 15, T. 16 S., R. 23 E., S.B.M., (C-3); thence westerly along the north line of the easterly extension of said Section 15 to its intersection with the mean high-water line of the west bank of the 1902-03 course of the Colorado River (C-4); thence upstream along the mean high-water line of the west bank of the 1902-03 course of the Colorado River to the point of beginning (C-1).

Parcel Yuma D: Beginning at a point on the international boundary between the United States and Mexico where it intersects the mid-channel of the present course of the Colorado River (D-1); thence upstream along said mid-channel of said river to the point where the California-Arizona state boundary turns northerly, in Section 36, T. 16 S., R. 22 E., S.B.M., to leave the channel of said river (D-2); thence northerly along the course of said state boundary to the point where it intersects the mean high-water line of the California (north) bank of said river (D-3); thence downstream along the mean high-water line of the California bank of said river to the point where said mean high-water line intersects the international boundary between the United States and Mexico (D-4); thence easterly along said international boundary to the point of beginning (D-1)

and depicted on Exhibit 4, attached hereto and incorporated herein by this reference, which the secretarial order complained of purports to include within the Fort Yuma Indian Reservation in the State of California, are lands belonging to the State of California in its sovereign capacity and are not a part of the reservation.

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47. The December 20, 1978 order of the Secretary is inconsistent with past secretarial orders and Department policy and action.

48. The December 20, 1978 order of the Secretary is not based upon substantial evidence and incorrectly interprets the 1893 agreement and 1894 ratifying statute. It is arbitrary, capricious and unreasonable, and is illegal and void.

49. By issuing the December 20, 1978 order, the Secretary has acted and continues to act outside his statutory powers to the detriment of plaintiffs.

50. An actual controversy has arisen and now exists between plaintiffs on the one hand, and the United States and the Secretary on the other hand, concerning the inclusion of the lands referred to in paragraph 46 within the boundaries of the Fort Yuma Indian Reservation. A fortiori, an actual controversy has arisen and now exists between plaintiffs on the one hand, and the United States and the Secretary on the other hand, as to the Colorado River water entitlement of the additional lands so encompassed. As a result of that order, the United States, the Secretary and the Quechan Tribe through the United States, are claiming that those additional lands are a part of the reservation, some of which they allege are practicably irrigable and therefore entitled to additional water rights.

51. Plaintiffs desire a judicial determination and declaration as to whether these lands, more particularly described in paragraph 46 herein, are or are not a part of the Fort Yuma Indian Reservation for the purpose of proper allocation of

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Colorado River water pursuant to the Boulder Canyon Project Act and Arizona v. California, supra, at 546.

52. Plaintiffs further desire a mandatory injunction to require the Secretary to set aside that portion of the December 20, 1978 secretarial order at issue, which purports to include certain lands of the bed of the Colorado River belonging to the State of California within the Fort Yuma Indian Reservation in the State of California, and to prevent the unauthorized use of Colorado River water on any land declared to be outside the reservation boundaries.

53. The declaration and injunction are necessary and appropriate at this time so that plaintiffs can protect their rights to Colorado River water and can determine what portion, if any, of their existing Colorado River entitlement may be reduced in the future by valid Indian reservation diversions. Such information is vital, at this time, to enable plaintiffs to make projections of the availability of water to meet the future needs of their service areas.

THIRD CLAIM FOR RELIEF

(Fort Mojave Indian Reservation)

54. Metropolitan incorporates by reference each and every allegation contained in paragraphs 1, 2, 5, 6 through 10, 13 through 17, 20 through 23, and 26 through 32, inclusive hereof.

55. An Executive Order dated March 30, 1870, established and defined the Fort Mojave Indian Reservation, consisting of the Camp Mojave Reserve and the Camp Mojave Hay and

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Wood Reserve. A copy of the Executive Order is attached hereto, incorporated herein by this reference and marked as Exhibit 5. The Executive Order provides as follows:

> "Camp Mojave. Commencing at a post marked U.S. in a mound of earth situated N. 83° 31' 37" E. 68.99 chains distant from the Flag staff at the Post. Thence variation 14° 08' 28" East. South 33° 08' 28" W. 240.00 chains to a post marked U.S. in a mound of sand. Thence N. 56° 51' 32" W. 232.60 chains to a post marked U.S. in a mound of coarse gravel. Thence N. 33° 08' 28" E. 240.00 chains to a post marked U.S. in a mound of coarse gravel near the West bank of Beaver Lake. Thence S. 56° 51' 32" E. 232.60 chains to the point of commencement. The said boundaries containing 5582 acres 1 rood 24 perches, a little more or less."
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> "Camp Mojave Reservation for Hay and Wood-- Commencing at a post marked U.S. in mound of earth situated S. 10° 43' 41" E. 347.52 chains distant from the Flag Staff at Camp Mojave and about 20 chains S.W. from the point where the road crosses the top of the Mesa. Thence variation 14° 08' 28" East. S. 1° 04' 28" W. 272.50 chains to a post marked U.S. in mound of earth near the Quartermasters Corral. Thence S. 76° 17' 28" W. 228.50 chains to a post marked U.S. in mound of earth near the left bank of the Colorado River. Thence N. 23° 01' 32" W. 362.70 chains to a post marked U.S. in a mound of earth near the left bank of the Colorado River. Thence S. 88° 45' 32" E. 369.00 chains to the post at the point of commencement. The said boundaries containing 9,114.81 acres, more or less." (Emphasis added.)

56. The 1870 order was based upon a survey conducted by Lt. George Wheeler. The description used in the Wheeler survey was adopted in the order.

57. The map prepared by Lt. Wheeler using his survey notes depicts the boundaries of the Camp Mojave Hay and Wood Reserve and shows the Colorado River running along the western boundary of the Camp Mojave Hay and Wood Reserve.

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58. By Executive Order dated September 19, 1890, the Camp Mojave Hay and Wood Reserve was transferred to the Department of the Interior to be held in trust for the Mojave Indian Tribe. A Copy of the Executive Order is attached hereto as Exhibit 6 and incorporated herein by this reference. The 1890 Executive Order did not alter the description of the Camp Mojave Hay and Wood Reserve.

59. As noted above, in the original Arizona v. California, supra, proceedings, the Special Master held as to the boundaries of the Camp Mojave Hay and Wood Reserve generally in favor of the California Parties.

60. On June 3, 1974, the Secretary issued an order finding the western boundary of the Camp Mojave Hay and Wood Reserve to be located west of the flood plain of the Colorado River. Copies of the Order and the Solicitor's opinion upon which the Order is based are attached hereto, incorporated herein by this reference and marked, respectively, as Exhibits 7 and 8.

61. The June 3, 1974 order of the Secretary is not based upon substantial evidence and is not supported by the description of the Camp Mojave Hay and Wood Reserve and the circumstances surrounding its creation. It is arbitrary, capricious and unreasonable, and therefore is illegal and void.

62. By issuing the June 3, 1974 order, the Secretary has acted and continues to act outside his statutory powers to the detriment of Metropolitan.

63. Metropolitan is informed and believes and thereon alleges that the Secretary is delivering Colorado River water to

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lands located west of the left bank of the Colorado River in its last natural course.

64. An actual controversy has arisen and now exists among Metropolitan, the United States and the Secretary concerning the location of the western boundary of the Camp Mojave Hay and Wood Reserve. A fortiori, an actual controversy has arisen and now exists among Metropolitan, the United States and the Secretary as to the Colorado River water entitlement of the additional lands encompassed by the June 3, 1974 order. As a result, the United States, the Secretary and the Fort Mojave Indians through the United States are claiming additional lands as a part of the reservation, some of which they allege are practicably irrigable and therefore entitled to additional water rights.

65. Metropolitan desires a judicial determination and declaration as to the boundaries of the Fort Mojave Indian Reservation for the purpose of proper allocation of Colorado River water pursuant to the Boulder Canyon Project Act and Arizona v. California, supra, at 546.

66. Metropolitan further desires a mandatory injunction to require the Secretary to set aside the June 3, 1974 secretarial order at issue and to prevent the unauthorized use of Colorado River water on any land declared to be outside the reservation boundaries.

67. The declaration and injunction are necessary and appropriate at this time so that Metropolitan can protect its rights to Colorado River water and can determine what portion, if any, of its existing Colorado River entitlement may be reduced

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in the future by valid Indian reservation diversions. Such information is vital, at this time, to enable Metropolitan to make projections of the availability of water to meet the future needs of its service area.

FOURTH CLAIM FOR RELIEF

(Fort Mojave Indian Reservation)

68. Metropolitan incorporates by reference each and every allegation contained in paragraphs 1, 2, 5, 6 through 10, 13 through 17, 20 through 23, 26 through 32, and 55 through 60, inclusive hereof.

69. The June 3, 1974 secretarial order, Exhibit 7 hereof, defining the boundaries of the Fort Mojave Indian Reservation purports to include certain lands of the bed of the Colorado River in its last natural course as a part of the Fort Mojave Indian Reservation.

70. Metropolitan is informed and believes and thereon alleges that the State of California is the owner of certain portions of the west half of the bed of the Colorado River in its last natural course. Exhibit 9, attached hereto and incorporated by this reference, depicts the alleged boundary of the Hay and Wood Reserve as claimed by the secretarial order and depicts the lands more particularly described as:

> Parcel Mojave D: Beginning at the point where the mid-channel of the abandoned bed of the 1947 course of the Colorado River intersects with the westerly extension of the northerly boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation (D-1); thence westerly along the extension of the northerly boundary of said Hay and Wood Reserve to its intersection with the mean high-water line of the west bank of the abandoned bed of the 1947 course of said river (D-2); thence downstream along the mean high-water line of the abandoned bed of the 1947

course of said river to its intersection with the mean high-water line of the west bank of the present course of the Colorado River (D-3); thence downstream along the mean high-water line of the west bank of the present course of the Colorado River to its intersection with the westerly extension of the southerly boundary of said Hay and Wood Reserve (D-4); thence easterly along said extension of the southerly boundary of said Hay and Wood Reserve to its intersection with the mid-channel of the present course of the Colorado River (D-5); thence upstream along the mid-channel of the present course of the Colorado River to its intersection with the mid-channel of the abandoned bed of the 1947 course of the Colorado River (D-6); thence upstream along the mid-channel of the abandoned bed of the 1947 course of said river to its intersection with the westerly extension of the northerly boundary of the Hay and Wood Reserve, the point of beginning (D-1).

Therein, this land which the secretarial order complained of purports to include within the Fort Mojave Indian Reservation in the State of California is land belonging to the State of California in its sovereign capacity and is not a part of the reservation.

71. Metropolitan is informed and believes and thereon alleges that the State of Arizona is the owner of certain portions of the east half of the bed of the Colorado River in its last natural course. Therein, the land more particularly described as:

Parcel Mojave C: Beginning at the point where the mid-channel of the abandoned bed of the 1947 course of the Colorado River intersected the westerly extension of the northerly line of the Hay and Wood Reserve of Fort Mojave Indian Reservation (C-1); thence downstream along the mid-channel of the 1947 course of said river to its intersection with the mid-channel of the present course of the Colorado River (C-2); thence upstream along the mid-channel of the present course of said river to its intersection with the westerly extension of the northerly line of said Hay and Wood Reserve (C-3); thence westerly along the extension of the northerly boundary of said Hay and Wood Reserve to the mid-channel of the abandoned bed of the 1947 course of the Colorado River, the point of beginning (C-1).

and as depicted on Exhibit 9 attached hereto and incorporated herein by this reference, which the secretarial order complained

of purports to include within the Fort Mojave Indian Reservation is land within the State of California, but belongs to the State of Arizona in its sovereign capacity and is not a part of the reservation.

72. The June 3, 1974 order of the Secretary is not based upon substantial evidence. It is arbitrary, capricious and unreasonable, and therefore is illegal and void.

73. By issuing the June 3, 1974 order, the Secretary has acted and continues to act outside his statutory powers to the detriment of Metropolitan.

74. Metropolitan is informed and believes and thereon alleges that land claimed by the United States to be a part of the Fort Mojave Indian Reservation in the State of California, irrespective of the secretarial order is land belonging to the State of California and is not a part of the reservation. Said land is more particulary described as:

> Parcel Mojave B: Beginning at the point where the mean high-water line of the west bank of the abandoned bed of the 1947 course of the Colorado River intersected with the California-Nevada state boundary (B-1); thence downstream along the mean high-water line of the west bank of said river to its intersection with the westerly extension of the northerly boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation (B-2); thence easterly along the extension of the northerly boundary of said Hay and Wood Reserve to its intersection with the mid-channel of the abandoned bed of the 1947 course of said river (B-3); thence upstream along the mid-channel of the abandoned bed of the 1947 course of said river to its intersection with the California-Nevada state boundary as it existed in 1947 (B-4); thence northwesterly along said state boundary to the point of beginning (B-1)

and is depicted on Exhibit 9 hereof.

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75. Metropolitan is informed and believes and thereon alleges that land claimed by the United States to be a part of the Fort Mojave Indian Reservation irrespective of the secretarial order is land within the State of California, but belongs to the State of Arizona and is not a part of the reservation. Said land is more particularly described as:

> Parcel Mojave A: Beginning at the point where the mid-channel of the present course of the Colorado River intersected the southeasterly extension of the California-Nevada state boundary (A-1); thence downstream along said mid-channel of the present course of said river to its intersection with the westerly extension of the northerly boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation (A-2); thence westerly along said extension of the northerly line of said Hay and Wood Reserve to its intersection with the mid-channel of the abandoned bed of the 1947 course of said river (A-3); thence upstream along the mid-channel of the abandoned bed of the 1947 course of said river to its intersection with the California-Nevada state boundary as it existed in 1947 (A-4); thence southeasterly along the extension of said state boundary to the point of beginning (A-1)

and is depicted on Exhibit 9 hereof.

76. An actual controversy has arisen and now exists between Metropolitan, the United States and the Secretary concerning the inclusion of the lands referred to in paragraphs 70, 71, 74 and 75, within the boundaries of the Fort Mojave Indian Reservation in the State of California. A fortiori, an actual controversy has arisen and now exists between Metropolitan, the United States and the Secretary as to the Colorado River water entitlement of the additional lands so encompassed. As a result of the June 3, 1969 secretarial order and the claim of the United States, irrespective of the secretarial order to

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lands of the Colorado River bed in its last natural course, the United States, the Secretary and the Fort Mojave Indian Tribe through the United States, are claiming that these additional lands are a part of the reservation, some of which they allege are practicably irrigable and therefore entitled to additional water rights.

77. Metropolitan desires a judicial determination and declaration as to whether these lands, more particularly described in paragraphs 70, 71, 74 and 75 hereof, are or are not a part of the Fort Mojave Indian Reservation in the State of California, for the purpose of proper allocation of Colorado River water pursuant to the Boulder Canyon Project Act and Arizona v. California, supra, at 546.

78. Metropolitan further desires a mandatory injunction to require the Secretary to set aside that portion of the June 3, 1974 secretarial order at issue, which purports to include certain lands of the bed of the Colorado River in its last natural course belonging to the States of California and Arizona, respectively, within the reservation in the State of California, and to prevent the unauthorized use of Colorado River water on any land declared to be outside the reservation boundaries.

79. The declaration and injunction are necessary and appropriate at this time so that Metropolitan can protect its right to Colorado River water and can determine what portion, if any, of its existing Colorado River entitlement may be reduced in the future by valid Indian reservation diversions. Such

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information is vital, at this time, to enable Metropolitan to make projections of the availability of water to meet the future needs of its service area.

FIFTH CLAIM FOR RELIEF

(Colorado River Indian Reservation)

80. Plaintiff Metropolitan incorporates by reference each and every allegation contained in paragraph 1, 2, 5, 6 through 10, 13 through 17, 20 through 23 and 26 through 32, inclusive hereof.

81. The Colorado River Indian Reservation was established by the Act of March 3, 1865. (13 Stat. 541, 559.)

82. The boundaries of the reservation were subsequently modified by various Executive Orders, including the Executive Order of May 15, 1876, a copy of which is attached hereto as Exhibit 10 and incorporated by this reference, which provided, in pertinent part:

> "Beginning at a point where La Paz Arroyo enters the Colorado River, 4 miles above Ehrenberg; thence easterly with said arroyo to a point south of the crest of La Paz Mountain; thence with said mountain crest in a northerly direction to the top of Black Mountain; thence in a northwesterly direction over the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning."
> (Emphasis added.)

83. The 1876 Executive Order established a portion of the boundary of the reservation which changes as the course of the Colorado River changes, except when such changes are due

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to avulsion (sudden and perceptible loss or addition to land by action of water, or sudden change in the bed or course of a stream).

84. As noted above, in the original Arizona v. California, supra, proceedings, the Special Master held as to the Colorado River Indian Reservation boundaries, generally in favor of the California Parties.

85. The Secretary, in an order dated January 17, 1969, declared that the 1876 Executive Order created a permanent, unchanging boundary along the west bank of the Colorado River as it existed in 1876. Copies of the Order and the Solicitor's Opinion upon which the order is based, are attached hereto, incorporated herein by this reference and marked, respectively, as Exhibits 11 and 12.

86. The January 17, 1969 order of the Secretary is not based upon substantial evidence and erroneously interprets the 1876 Executive Order. It is arbitrary, capricious and unreasonable, and therefore is illegal and void.

87. By issuing the January 17, 1969 order, the Secretary has acted and continues to act outside his statutory powers to the detriment of Metropolitan.

88. Metropolitan is informed and believes and thereon alleges that the Secretary is delivering Colorado River water to lands west of the western bank of the Colorado River in its last natural course in the area described as:

> " . . . thence in a northwesterly direction over the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; . . . ."

89. An actual controversy has arisen and now exists among Metropolitan, the United States and the Secretary, concerning the boundary of the Colorado River Indian Reservation. A fortiori, an actual controversy has arisen and now exists among Metropolitan, the United States and the Secretary as to the Colorado River water entitlement of the additional lands encompassed by the January 17, 1969 order. As a result, the United States, the Secretary and the Colorado River Indian Tribe through the United States are claiming additional lands are a part of the reservation, some of which they allege are practicably irrigable and therefore entitled to additional water rights.

90. Metropolitan desires a judicial determination and declaration as to the boundaries of the Colorado River Indian Reservation for the purpose of proper allocation of Colorado River water pursuant to the Boulder Canyon Project Act and Arizona v. California, supra, at 546.

91. Metropolitan further desires a mandatory injunction to require the Secretary to set aside the January 17, 1969 secretarial order at issue and to prevent the unauthorized use of Colorado River water on any land declared to be outside the reservation boundaries.

92. The declaration and injunction are necessary and appropriate at this time so that Metropolitan can protect its right to Colorado River water and can determine what portion, if any, of its existing Colorado River entitlement may be reduced in the future by valid Indian reservation diversions. Such information is vital, at this time, to enable Metropolitan to

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make projections of the availability of water to meet the future needs of its service area.

SIXTH CLAIM FOR RELIEF

93. Plaintiff Metropolitan incorporates by reference each and every allegation contained in paragraph 1, 2, 5, 6 through 10, 13 through 17, 20 through 23, 26 through 32 and 81 through 85, inclusive hereof.

94. Metropolitan is informed and believes and thereon alleges that the State of California is the owner of certain portions of the west half of the bed of the Colorado River in its last natural course and within the State of California. Therein, the lands more particularly described as:

> Parcel Colorado A: Beginning at the point where the westerly boundary of the Colorado River Indian Reservation from the top of Riverside Mountain in a direct line toward the place of beginning (as described in the May 15, 1876 Executive Order of President U.S. Grant) intersects the mean high-water line of the west bank of the Colorado River (A-1); thence downstream along the mean high-water line of the west bank of said river to a point where the mean high-water line of the west bank of the present course of the Colorado River intersects with the mean high-water line of the abandoned bed of the Colorado River as it existed immediately prior to the alleged avulsion caused by the Olive Lake Cut in February 1920 (A-2); thence southerly to the mid-channel of the present course of the Colorado River in Section 14, T. 4 N., R. 22 W., G. & S.R.M. (A-3); thence upstream along the mid-channel of the Colorado River to the point of intersection of said mid-channel with the extension of the aforesaid westerly boundary of said Reservation from the top of Riverside Mountain toward the place of beginning as described in the 1876 Executive Order (A-4); thence northerly along said extension of the westerly boundary of the Reservation from the top of Riverside Mountain to the point of beginning (A-1).

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Parcel Colorado B: Beginning at the point on the mean high-water line of the west bank of the present course of the Colorado River where it intersects with the mean high-water line of the abandoned bed of the Colorado River as it existed immediately prior to the alleged avulsion caused by the Olive Lake Cut in February 1920 (B-1); thence downstream along the mean high-water line of said abandoned bed of said river to a point in Section 12 T. 6 S., R. 23 E., S.B.M., where it intersects with the mean high-water line of the west bank of the present channel of the Colorado River (B-2); thence northerly along the mean high-water line of the west bank of the present channel of said river to its intersection with the mid-channel of the abandoned bed of the 1920 channel of said river (B-3); thence upstream along the mid-channel of the abandoned bed of the 1920 channel of said river to a point where it intersects the mean high-water line of the west bank of the present course of said river, opposite the point of beginning (B-4); thence easterly to the point of beginning (B-1).

Parcel Colorado D: Beginning at a point on the mean high-water line of the west bank of the abandoned bed of the Colorado River, as it existed immediately prior to the Ninth Avenue Cut in 1943, where it intersects the mean high-water line of the west bank of the present course of the Colorado River in Section 24, T. 6 S., R. 23 E., S.B.M. (D-1); thence downstream along the mean high-water line of the west bank of said abandoned 1943 channel of the Colorado River to a point where said mean high-water line intersects the westerly extension of the south boundary of the Colorado River Indian Reservation in Section 23, T. 6 S., R. 23 E., S.B.M. (D-2); thence easterly along said westerly extension of the south boundary of said Reservation to its intersection with the mid-channel of the abandoned bed of the 1943 course of the Colorado River (D-3); thence upstream along the mid-channel of said abandoned river bed to the point where it intersects the mean high-water line of the west bank of the present course of the Colorado River (D-4); thence northwesterly along the mean high-water line of the west bank of the present course of the Colorado River to its intersection with the mean high-water line of the west bank of the abandoned 1943 channel of said river, the point of beginning (D-1).

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Parcel Colorado F: Beginning at the point where the mid-channel of the abandoned bed of the 1920 channel of the Colorado River intersects with the mean high-water line of the west bank of the present course of said river, in Section 12, T. 6 S., R. 23 E., S.B.M. (F-1); thence downstream along the mean high-water line of the west bank of the present course of the Colorado River to its intersection with the mid-channel of the abandoned bed of the 1943 course of said river in Section 24, T. 6 S., R. 23 E., S.B.M. (F-2); thence northeasterly to the intersection of the mid-channel of the abandoned bed of the 1943 course of said river with the mid-channel of the present course of said river (F-3); thence upstream along the mid-channel of the present course of the Colorado River to its intersection with the mid-channel of the abandoned bed of the 1920 course of said river (F-4); thence westerly along the mid-channel of the abandoned bed of the 1920 course of said river to the point of beginning (F-1)

and as depicted on Exhibit 13, attached hereto and incorporated herein by this reference, which lands the United States claims to be a part of the Colorado River Indian Reservation irrespective of the secretarial order complained of are lands within the State of California and belong to the State of California in its sovereign capacity and are not a part of the reservation.

95. Metropolitan is informed and believes and thereon alleges that the State of Arizona is the owner of certain portions of the east half of the bed of the Colorado River in its last natural course and within the State of California. Therein, the lands more particularly described as:

Parcel Colorado C: Beginning at the point where the mid-channel of the abandoned bed of the Colorado River as it existed immediately prior to the alleged avulsion caused by the Olive Lake Cut in February 1920 intersects with the mean high-water line of the west bank of the present course of the Colorado River in Section 14, T. 4 N., 22 W., G. & S.R.M. (C-1); thence downstream along the mid-channel of said abandoned bed of the 1920 course of the Colorado River to the point where said mid-channel intersects with the mean high-water line of the west bank of the present course of the Colorado River (C-2); thence northerly along the mean high-water line of the west bank of

the present course of the Colorado River to its intersection with the mean high-water line of the east bank of the abandoned 1920 channel of said river (C-3); thence upstream along the mean high-water line of the east bank of the abandoned bed of the 1920 course of the Colorado River to a point where said mean high-water line intersects with the mean high-water line of the west bank of the present course of the Colorado River in Section 15, T. 4 N., R. 22 W., G. & S.R.M., opposite the point of beginning (C-4); thence easterly to the point of beginning (C-1).

Parcel Colorado E: Beginning at a point where the mean high-water line of the east bank of the abandoned bed of the Colorado River as it existed immediately prior to the Ninth Avenue Cut in 1943 intersects with the mean high-water line of the west bank of the present course of the Colorado River in Section 24, T. 6 S., R. 23 E., S.B.M. (E-1); thence northwesterly to the point where the mid-channel of said abandoned bed of the 1943 course of the Colorado River intersects with the mean high-water line of the west bank of the present course of the Colorado River (E-2); thence downstream along the mid-channel of the abandoned bed of said 1943 course of said river to a point where it intersects the westerly extension of the south boundary of the Colorado River Indian Reservation in Section 23, T. 6 S., R. 23 E., S.B.M. (E-3); thence easterly along the westerly extension of the south boundary of said Reservation to its intersection with the mean high-water line of the east bank of the abandoned bed of the 1943 course of the Colorado River (E-4); thence upstream along the mean high-water line of the east bank of the abandoned bed of the 1943 course of said river to the point of beginning (E-1)

and depicted on Exhibit 13, attached hereto and incorporated herein by this reference, which land the United States claims to be a part of the Colorado River Indian Reservation irrespective of the secretarial order complained of, are lands within the State of California, but belong to the State of Arizona in its sovereign capacity and are not a part of the Reservation.

96. An actual controversy has arisen and now exists between Metropolitan, the United States and the Secretary

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concerning the inclusion of the lands referred to in paragraphs 94 and 95 within the boundaries of the Colorado River Indian Reservation. A fortiori, an actual controversy has arisen and now exists between Metropolitan, the United States and the Secretary as to the Colorado River water entitlement of the additional lands so encompassed. The United States, the Secretary and the Colorado River Indian Tribe through the United States, are claiming that these additional lands are a part of the reservation, some of which they allege are practicably irrigable and therefore entitled to additional water rights.

97. Metropolitan desires a judicial determination and declaration as to whether these lands, more particularly described in paragraphs 94 and 95 hereof are or are not a part of the Colorado River Indian Reservation for the purpose of proper allocation of Colorado River water pursuant to the Boulder Canyon Project Act and Arizona v. California, supra, at 546.

98. The declaration and injunction are necessary and appropriate at this time so that Metropolitan can protect its right to Colorado River water and can determine what portion, if any, of its existing Colorado River entitlement may be reduced in the future by valid Indian reservation diversions. Such information is vital, at this time, to enable Metropolitan to make projections of the availability of water to meet the future needs of its service area.

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WHEREFORE, Metropolitan and Coachella pray for judgment against the defendants as follows:

(a) As to the First Claim for Relief, Metropolitan and Coachella pray:

(1) that the December 20, 1978 order of the Secretary be declared in error and void;

(2) for a determination and declaration that the boundary of the Fort Yuma Indian Reservation be determined in accordance with the 1893 agreement and the 1894 ratifying statute;

(3) for the issuance of a permanent injunction requiring the Secretary to set aside the December 20, 1978 order and prohibiting the use of Colorado River water on lands found to be outside the boundaries of the Fort Yuma Indian Reservation.

(b) As to the Second Claim for Relief, Metropolitan and Coachella pray:

(1) that the portion of the December 20, 1978 order of the Secretary which purports to include the lands of the bed of the Colorado River described in paragraph 46 hereof, as within the Fort Yuma Indian Reservation in the State of California, be declared in error and void;

(2) for a determination and declaration that the lands more particulary described in paragraph 46 hereof are not a part of the Fort Yuma Indian Reservation in the State of California;

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(3) for the issuance of a permanent injunction requiring the Secretary to set aside that portion of the December 20, 1978 order of the Secretary at issue which purports to include within the Fort Yuma Indian Reservation in the State of California, certain lands of the bed of the Colorado River belonging to the State of California as described in paragraph 46 hereof, and to prohibit the use of Colorado River water on lands found to be outside the boundaries of the Fort Yuma Indian Reservation.

(c) As to the Third Claim for Relief, Metropolitan prays:

(1) that the June 3, 1974 order of the Secretary fixing the western boundary of the Camp Mojave Hay and Wood Reserve west of the flood plain of the Colorado River be declared in error and void;

(2) for a determination and declaration that the western boundary of the Camp Mojave Hay and Wood Reserve is the left bank of the Colorado River in its last natural course, excluding the lands of the bed of the Colorado River;

(3) for the issuance of a permanent injunction requiring the Secretary to set aside the June 3, 1974 order at issue and prohibiting the use of Colorado River water on lands found to be outside the boundaries of the Camp Mojave Hay and Wood Reserve.

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(d) As to the Fourth Claim for Relief, Metropolitan prays:

(1) that the portion of the June 3, 1974 order of the Secretary which purports to include certain lands of the bed of the Colorado River as described in paragraphs 70, 71, 74 and 75 hereof, within the Fort Mojave Indian Reservation in the State of California, be declared in error and void;

(2) for a determination and declaration that the lands more particulary described in paragraphs 70, 71, 74 and 75 hereof are not a part of the Fort Mojave Indian Reservation in the State of California;

(3) for the issuance of a permanent injunction requiring the Secretary to set aside that portion of the June 3, 1974 order of the Secretary at issue which purports to include within the Fort Mojave Indian Reservation in the State of California, lands of the bed of the Colorado River as described in paragraphs 70, 71, 74 and 75 hereof, and to prohibit the use of Colorado River water on lands found to be outside the boundaries of the Fort Mojave Indian Reservation.

(e) As to the Fifth Claim for Relief, Metropolitan prays:

(1) that the January 17, 1969 order of the Secretary interpreting the western boundary of the Colorado River Indian Reservation to be along the west bank of the Colorado River as it existed in 1876 be declared in error and void;

(2) for a determination and declaration that the western boundary of the Colorado River Indian Reservation described as:

> " . . . thence in a northwesterly direction over the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; . . . . "

be declared to be the west bank of the Colorado River in its last natural course;

(3) for the issuance of a permanent injunction requiring the Secretary to set aside the January 17, 1969 order at issue and prohibiting the use of Colorado River water on lands found to be outside the boundaries of the Colorado River Indian Reservation;

(f) As to the Sixth Claim for Relief, Metropolitan prays:

(1) for a determination and declaration that the lands more particulary described in paragraphs 94 and 95 hereof are not a part of the Colorado River Indian Reservation in the State of California;

(2) for the issuance of a permanent injunction to prohibit the use of Colorado River water on lands found to be outside the boundaries of the Colorado River Indian Reservation;

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(g) As to all aforesaid Claims for Relief, Metropolitan and Coachella pray for:

(1) costs of suit incurred herein; and

(2) for such other and additional relief as the Court deems appropriate.

The Metropolitan Water District of Southern California
Carl Boronkay, General Counsel
Warren J. Abbott, Assistant General Counsel
Karen L. Tachiki, Deputy General Counsel

Coachella Valley Water District
Maurice C. Sherrill
Redwine and Sherrill

By Carl Boronkay
Carl Boronkay

EXECUTIVE MANSION, *January 9, 1884.*

In lieu of an Executive order dated July 6, 1883, setting apart certain lands in the Territory of Arizona as a reservation for the Yuma Indians, which order is hereby canceled, it is hereby ordered that the following-described tract of country in the State of California, except so much thereof as is embraced within the Fort Yuma Military Reservation, viz, beginning at a point in the middle of the channel of the Colorado River due east of the meander corner to sections 19 and 30, township 15 south, range 24 east, San Bernardino meridian; thence west on the line between sections 19 and 30 to the range line between townships 23 and 24 east; thence continuing west on the section line to a point which, when surveyed, will be the corner to sections 22, 23, 26, and 27, in township 15 south, range 21 east; thence south on the line between sections 26 and 27, in township 15 south, range 21 east, and continuing south on the section lines to the intersection of the international boundary, being the corner to fractional sections 34 and 35, in township 16 south, range 21 east; thence easterly on the international boundary to the middle of the channel of the Colorado River; thence up said river, in the middle of the channel thereof, to the place of beginning, be, and the same is hereby, withdrawn from settlement and sale and set apart as a reservation for the Yuma and such other Indians as the Secretary of the Interior may see fit to settle thereon: *Provided, however*, That any tract or tracts included within the foregoing-described boundaries to which valid rights have attached under the laws of the United States are hereby excluded out of the reservation hereby made.

It is also hereby ordered that the Fort Yuma Military Reservation before mentioned be, and the same is hereby, transferred to the control of the Department of the Interior, to be used for Indian purposes in connection with the Indian reservation established by this order, said military reservation having been abandoned by the War Department for military purposes.

CHESTER A. ARTHUR.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

DEC 20 1978

SECRETARIAL ORDER

I. SOLICITOR'S OPINION

The Solicitor has signed an Opinion recognizing that the 1884 Executive Order boundary of the Fort Yuma Indian Reservation, as modified by the Executive Order of December 19, 1900, which revoked the portion of the reservation lying south of the Colorado River in the then Territory of Arizona, still remains the reservation boundary. Said Opinion is hereby approved. Attached hereto is a map entitled "Fort Yuma Indian Reservation 1884-1974, revised September 1974 S.D.T.," depicting the general location of the reservation boundary today. The exact location of the Reservation boundary shall be determined hereafter by survey in accordance with the boundaries recognized by this Order.

II. RECOGNITION OF TRUST STATUS OF LANDS

Except as hereinafter stated, all lands which prior to this date have been managed under the jurisdiction of the Bureau of Land Management or the Bureau of Reclamation and which the attached map indicates are within the Ft. Yuma Indian Reservation (hereafter referred to as "Such Lands") are hereby recognized as being held in trust by the United States for the Quechan Tribe of the Fort Yuma Indian Reservation as of January 9, 1884.

III. EXCEPTIONS AND CONDITIONS

The Solicitor's Opinion holds that an 1893 Agreement ratified by an 1894 statute providing for allotment of certain lands on the Fort Yuma Reservation and cession to the United States of other reservation lands was subject to conditions that were never carried out. Although the Solicitor's Opinion holds that the cession provided for in

the Agreement and statute did not take place, and that reservation lands which would have been ceded in that statute and which were not later taken pursuant to the 1904 statute remain in tribal ownership, the Solicitor's Opinion also holds that (1) pursuant to statutes predating 1884, certain valid rights were acquired by third parties that are protected by the Executive Order, (2) pursuant to later statutes, various Reclamation project works were validly constructed on the reservation, and (3) other valid grants were made by agencies of the United States to third parties. Accordingly, reaffirmation and recognition of the Tribe's title in Such Lands is subject to the exceptions and conditions set forth in this Paragraph III

1. There is hereby excepted from the provisions and effect of Paragraph II hereof all rights of third parties created by or pursuant to Acts of Congress including but not limited to the Act of July 26, 1866, 14 Stat. 289, and the Act of March 3, 1871, 16 Stat. 573, and predating the Executive Order establishing the reservation in 1884.

2. All rights of third parties to Such Lands within the now-recognized reservation boundaries which have been established pursuant to law prior to this date including but not limited to existing permits, patents, leases, rights-of-way and other rights and interests, including those generally described in subparagraphs a through oo following (and more particularly described in the cited instruments):

a. Bureau of Land Management Permit No. L.A. 0138603 for a petroleum products pipeline, issued to Southern Pacific Pipelines, Inc.

b. Bureau of Reclamation (LBR) contract nos. 14-06-303-1119, 1120 and 1122, executed July 3, 1956, consisting of licenses issued to Southern Pacific Pipelines, Inc., for a petroleum products pipeline right-of-way within and across LBR canal, lateral and drain rights-of-way.

c. LBR contract nos. 14-06-303-623, executed April 16, 1954, and 14-06-303-1435, executed August 18, 1958, consisting of easements granted to the County of Imperial for roadway and bridge rights-of-way across LBR canal and drain rights-of-way.

d. LBR contract no. 14-06-303-2683, executed December 22, 1967, consisting of a license issued to the County of Imperial for use and maintenance of road crossings on certain structures across the All-American Canal.

e. LBR contract no. 14-06-303-2788, executed February 26, 1970, granting to the State of California the right to construct, reconstruct, operate and maintain highway bridges and a highway across the right-of-way reserved for the All-American Canal.

f. LBR contract no. 14-06-300-149, consisting of an easement granted to the Imperial Irrigation District on February 19, 1954 (BLM Serial No. R 01908) for the Pilot Knob Power Plant.

g. LBR contract nos. 14-06-303-3451, executed November 1, 1973, and 14-06-303-3551, executed April 15, 1975, consisting of leases issued to Steve Bain and Ned Foss, respectively, for livestock grazing and feeding purposes.

h. LBR contract nos. 14-06-303-3452, 3455, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3471 and 3487, all executed January 1, 1973, consisting of leases for agricultural purposes to various individuals and corporations.

i. LBR contract nos. I24r-635, executed October 17, 1949, I24r-678, executed June 4, 1951, 14-06-300-1730, executed December 9, 1965, 14-06-303-3114, executed October 29, 1970, 14-06-303-3284, executed January 1, 1972, 14-06-303-3285, executed March 1, 1972, 14-06-303-3436, executed August 9, 1973 and 14-06-303-3588, executed September 1, 1975, consisting of permits issued to various individuals and governmental bodies for the removal of sand, gravel and road construction materials.

j. LBR contract nos. 14-06-303-1330, executed December 5, 1957, and 14-06-303-1412, executed May 9, 1958, consisting of licenses issued to the Pacific Telephone and Telegraph Company for telephone and telegraph line rights-of-way within and across BOR levee and canal rights-of-way.

k. LBR unnumbered contract issued April 5, 1961 for an indefinite period consisting of license issued Pacific Telephone and Telegraph Company for a pay phone booth.

l. LBR contract no. 141r-399, executed April 4, 1944, amended May 29, 1946, March 29, 1968, and March 31, 1969, consisting of a permit issued to Southern California Telephone Company (succeeded by Pacific Telephone and Telegraph Company) for the use of government telephone line poles.

m. LBR contract nos. 14-06-303-2465, executed February 27, 1967, 14-06-303-2421, executed July 26, 1967, 14-06-303-2790, executed March 10, 1969, 14-06-303-2922, executed July 1, 1969, and 14-06-303-3181, executed July 1, 1971, consisting of licenses issued to Mountain States Telephone and Telegraph Company for telephone and telegraph cable line rights-of-way within and across LBR levees, canal, lateral, ditch and drain rights-of-way.

n. LBR contract no. 14-06-303-3171, executed September 21, 1971, consisting of a license issued to the County of Imperial, California, for a refuse disposal dump.

o. LBR contract no. 14-06-300-2283 issued to the State of Arizona for fish and wildlife management at Mittery Lake.

p. LBR contract no. 14-06-303-3369, executed January 1, 1972, consisting of a lease to O.L. Reynolds for a mobile home park.

g. LBR contract no. 14-06-303-3438 issued to the Quechan Tribe May 7, 1974 pursuant to the Act of June 17, 1902 (32 Stat. 388) as amended by Act of August 4, 1939 (53 Stat. 1187).

r. BLM permit no. LA 055165 for a right of way for "Gila Drop #4" power transmission line and access road; approved July 23, 1942 pursuant to Act of December 5, 1924 (43 Stat. 672); amended May 19, 1971.

s. BLM permit no. LA 077775 for a right of way for the All-American Canal including appurtenant structures and operating telephone line, issued pursuant to §4(p) of the Act of December 5, 1924 (43 Stat. 704; 43 U.S. §417).

t. BLM permit no. R-03272 for a right of way for the Upper and Lower Reservation levees issued May 31, 1963 pursuant to §4(p) of the Act of December 5, 1924 (43 Stat. 704; 43 U.S.C. §417).

u. BLM permit no. R-1278 for a right of way for a drainage ditch issued December 19, 1968, pursuant to §4(p) of the Act of December 5, 1924 (43 Stat. 704; 43 U.S.C. §417).

v. Bureau of Land Management (BLM) Permit no. LA040525 for a right of way for a power transmission line granted to Southern Sierra Power Company March 23, 1927 pursuant to the Act of February 15, 1901 (31 Stat. 790.

w. BLM Permit no. LA022892 issued July 24, 1913 pursuant to the Act of March 4, 1911 (36 Stat. 1253) to Pacific Telephone and Telegraph for a telephone line.

x. BLM Permit no. 732756 "K" ELV 75022-07 and 12771-22 issued to the Catholic Church for a Mission site by Departmental authority of June 8, 1921.

y. BLM Ser. No. R0329, right-of-way grant to the Imperial Irrigation District, as specified in BLM decision of April 9, 1962, for Imperial Laguna Drain No. 2.

z. BLM Ser. No. LA 0164552, right-of-way grant to the Imperial Irrigation District, as specified in BLM decision of November 10, 1960, as amended December 5, 1960, for an electrical transmission line.

aa. BLM Ser No. LA 0164553, right-of-way grant to the Imperial Irrigation District, as specified in BLM decision of August 13, 1964, for an electrical transmission line.

bb. BLM Ser. No. R2331, right-of-way granted to the California Division of Highways, as specified in BLM decision of June 12, 1970, as amended April 25, 1973, and May 29, 1975, for Interstate Route 8.

cc. BLM Ser. No. R2704, right-of-way granted to the Supervisors of Imperial County and the State of California, approved on October 24, 1930, noted in General Land Office letter 1396492 "F" IEC of December 16, 1930, for a highway.

dd. BLM Ser. No. LA 0153352, right-of-way granted to Southern Pacific Pipe Lines, Inc., as specified in BLM decision of December 29, 1959, for a cathodic protection unit.

ee. BLM Ser. No. S3430, right-of-way granted to Southern Pacific Railroad Company by the Act of March 3, 1871, 16 Stat. 573, and confirmed by section 17 of the Act of August 15, 1894, 28 Stat. 335, for a railroad.

ff. BLM agricultural and residential use permits, BLM Ser. Nos. 1C-1(A), 1C-2(A), 1C-3(A), 1C-5(A), 1C-9(R), 2A-25(A), 2A-30(A),*/ 2C-3(A), 2C-4(A), 2C-5(A), 2C-6(A), 2C-9(A), 2C-14(A), 2C-15(A), 2C-25(a)*/ 2C-31(A),*/ 2C-32(A), 2C-35(A), 2C-37(A), 2C-38(R), 2C-41(R), 2C-42(R), 2C-43(R), 2C-44(R), 2C-45(R), 2C-46(R), 2C-48(R), 2C-51(R), 2C-58(R), 2C-CM-4(R), 2C-CM-5(R), 2C-LD-5(R), 3C-TH-1(R), 3C-TH-2(R), 3C-TH-4(R), 3C-TH-5(R), 3C-TH-6(R), 3C-TH-7(R), 3C-TH-8(R), 3C-TH-10(R), 3C-TH-11(R), 3C-TH-12(R), 3C-TH-13(R), 3C-TH-13a(R), 3C-TH-13b(R), 3C-TH-14(R),

*/ The determination by BLM to terminate these permits is being appealed by the permittees in Power v. Frizzell, No. 75-708 (D. Ariz.). Pending a decision on this appeal, the permittees' rights are preserved for the remainder of their terms.

3C-TH-17(R), 3C-TH-26(R), 3C-TH-29(R), 3C-TH-30(R), 3C-TH-30a(R), 3C-TH-32(R), 3C-TH-43(R), 3C-TH-45(R), 3C-TH-47(R), 3C-TH-50(R), 3C-TH-51(R), 3C-TH-52(R), 3C-TH-53(R), 3C-TH-54(R), 3C-TH-55(R), 3C-TH-56(R), 3C-TH-57(R), 3C-TH-58(R), 3C-TH-59(R), 3C-TH-61(R), 3C-TH-62(R), 3C-TH-63(R), 3C-TH-64(R), 3C-TH-65(R), 3D-TH-66(R), 3C-TH-67(R), 3C-TH-68(R), 3C-TH-69(R), 3C-TH-70a(R), 3C-TH-71(R), 3C-TH-71a(R), 3C-TH-71b(R), 3C-TH-72(R), 3C-TH-72a(R), 3C-TH-77(R), 3C-TH-78b(R), 3C-TH-79(r), 3C-TH-81(R), 3C-TH-82(R), 3C-TH-83(R), 3C-TH-84(R), 3C-TH-85(R), 3C-TH-86(R), 3C-TH-87(R), 3C-TH-88(R), 3C-TH-89(R), 3C-TH-92(R), 3C-TH-93(R), 3C-TH-94(R), 3C-TH-95(R), 3C-TH-96(R), 3C-TH-97(R), 3C-TH-98(R), 3C-TH-99(R).

gg. BLM Ser. No. R05651, right-of-way, as specified in BLM decision of August 25, 1964, for a transmission line.

hh. BLM Ser. No. S3450, right-of-way grant to the Southern Pacific Railroad approved June 18, 1907.

ii. BLM Ser. No. S3488, right-of-way grant to the Southern Pacific Railroad approved December 18, 1928, for station grounds.

jj. BLM Ser. No. S3484, right-of-way grant to the Inter California Railway approved February 10, 1910.

kk. BLM Ser. No. S3441, amended right-of-way grant to the California Highway Commission approved October 10, 1927, for a highway.

ll. Federal Power Commission Power Project 589 right of way issued to the Southern Sierra Power Company and successors for transmission line and appurtenant structures, issued May 10, 1926 pursuant to §24 of the Act of June 10, 1920 (41 Stat. 1063).

mm. Federal Power Commission Power Project 1397 right of way issued to Nevada Electric Co. July 1, 1938 pursuant to §24 of the Act of June 10, 1920 as amended by Act of August 26, 1935 (49 Stat. 838) for power transmission facilities.

nn. Federal Power Commission Power Site 614 right of way for power transmission facilities issued to Coachella Valley Electric Company May 2, 1917 pursuant to Act of June 25, 1910 (36 Stat. 847).

oo. A right of way granted to Southern Pacific Railroad Company pursuant to the Act of March 2, 1899, 30 Stat. 990 and confirmed in part by the Act of January 24, 1923, 42 Stat. 1172 and approved on July 29, 1926.

Excluding, however, those rights granted in the Riverside Park Lease with Yuma County (contract #14-010002-0007) to which lease the Tribe has withheld its consent and may instead terminate upon payment by the Tribe of fair compensation for all improvement, if any, which have been constructed on those lands since the effective date of the lease.

3. There is hereby excepted from the provisions and effect of Paragraph II hereof all rights and interests in lands in the so-called Bard area, opened to private settlement purusant to section 25 of the Act of April 21, 1904 (33 Stat. 189, 224).

As to all rights-of-way listed above which are not on lands listed in paragraph 4 of this Order and which were issued under the assumption that the lands involved were not Indian lands, I hereby grant a right-of-way pursuant to the authority vested in me by the Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. §§323-28, each such grant being for the unexpired term of the original grant and subject to precisely the same terms and conditions as contained in the original grant. The Tribe has given its consent to these grants in Resolution R-19-77 dated September 29, 1977 and, purusant to 25 CFR §1.2, I hereby waive the requirements of 25 CFR part 161 pertaining to these rights-of-way, since I find that such waiver is in the best interest of the Quechan Indians.

As to all other permits, leases and other rights and interests listed above which are not on lands listed in paragraph 3 of this Order and which were issued under the assumption that the lands involved were not Indian lands, the Tribe has autorized and consented to issuance of such permits, leases and other rights and interests in Resolution R-19-77 dated September 29, 1977, and I hereby approve the same, pursuant to authority contained in the Act of May 11, 1938, c. 198, §1, 52 Stat. 347, 25 U.S.C. §396a, the Act of August 15, 1894, c. 290, §1, 28 Stat. 305, 25 U.S.C. §402, the Act of July 3, 1926, c. 787, 44 Stat. 894, 25 U.S.C. §402a, and the Act of August 9, 1955, c. 615, §1, 69 Stat. 539, 25 U.S.C. §415, each such permit, lease or other right or interest being for the unexpired term and subject to precisely the same terms and conditions specified in the original instrument. Pursuant to 25 CFR §1.2, I hereby waive the requirements of 25 CFR parts 131, 151 and 171 pertaining to these permits, leases and other rights and interests since I find that such waiver is in the best interest of the Quechan Indians.

4. There is hereby excepted from the provisions and effect of Paragraph II hereof fee title in the United States without being held in trust for the Quechan Tribe to the works and appurtenances including but not limited to the works described in the following subparagraphs a through r constructed pursuant to congressional authorization, including the Reclamation Act of June 17, 1902 (32 Stat. 388), acts amendatory and supplementary thereto, and the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057), and fee title in the United States, without being held in trust for the Quechan Tribe, to lands occupied by all of said works and appurtenances, and there is also reserved the right of the United States, its licensees and contractors, to operate, maintain, and reconstruct said works and appurtenances, including but not limited to:

a. The All-American Canal, and all appurtenances (including but not limited to the Pilot Knob Check and Wasteway back to the Colorado River) as generally shown on Drawing No. 35-300-48, and Drawing No. 35-303-2127 attached hereto and incorporated herein by reference.

b. Laguna Dam Protection and Security Zone as shown on Drawing No. 423-300-704 attached hereto and incorporated herein by reference.

c. Laguna Settling Basin, Sediment Disposal Area and Security Zone, as shown and named as "Channel" and most of the "Wildlife Area" on the above Drawing No. 423-300-704.

d. Yuma Main Canal, California Wasteway, and Colorado River Siphon. The general location of the Yuma Main Canal and California Wasteway as shown and named on the above Drawing No. 35-300-48. The Siphon under the Colorado River is identified as "Siphon" on enclosed Drawing No. 212-303-1100 attached hereto and incorporated herein by reference.

e. Detention Reservoir Opposite Wash Overpasses on All-American Canal. At present there is only one area defined as a "Detention Reservoir," that being the Detention Reservoir as shown on Drawing No. 35-303-2127, basically existing below the All-American Canal. This reservoir is erroneously depicted as being part of the patented Bard area on the map referred to in Paragraph I hereof.

f. Upper and Lower Reservation Levees. The locations of the Upper and Lower Protective Levees are shown on Drawing No. 35-300-48; however, the Upper Levee is denoted only as "Reservation Levee." Both Levees are properly denoted on Drawing No. 35-303-2127.

g. Old Yuma Main Canal. The general location of this facility, a large portion of which is utilized as an interceptor drain, is shown on Drawing No. 212-303-1100.

h. Irrigation Canals and Laterals in Reservation Division Yuma Project. Drawings Nos. 35-303-2127 and 35-300-48 show these irrigation facilities.

i. All Drainage Channels as Presently Exist. Drawing Nos. 35-303-2127 and 35-300-48 indicate these facilities.

j. Siphon Drop and Pilot Knob Power Plants Together with Related Transmission Lines and Appurtenances. Both the Siphon Drop and Pilot Knob power plant locations are shown on Drawing No. 35-300-48, respectively named "Siphon Drop Power Plant" and "Pilot Knob Power Plant." In both cases, related facilities and appurtenances such as the Pilot Knob Drop, residences, other buildings, and related transmission lines and communication lines are not identified on any drawing.

k. Well Clusters. Several well clusters are placed along the Colorado River flood plain in conjunction with the U.S. Geological Survey, the purpose of which is a study to measure return flows. There is no reproducible drawing that would show as a composite the locations. The general locations are shown by "blue" lines on drawing No. 35-300-4

l. Parker-Davis 161-Kv Transmission Line. This line traverses the area from its crossing of the Colorado River westerly to the Knob Sub-station. The location is shown on Drawing No. 35-300-48.

m. Boundary Pumping Plant 34.5-Kv Transmission Line. This line interties the Valley Division's boundary pumping plant, the Yuma County Water Users' Association Headquarter Building, California Wasteway, Siphon Drop, and Imperial Dam, and is shown on Drawing No. 35-300-48.

n. Interconnecting Telephone, Electrical, and Remote Control Lines to Project Features. These features, which are appurtenances to other project facilities, are not contained on any drawings but are largely within rights-of-way of other project features.

o. Senator Wash Dam 69-Kv Transmission Line. Locati shown on Drawing No. 35-300-48.

p. Collector Line (South Gila Drainage). Location shown on Drawing No. 35-300-46 by "blue" pencil line extending from the Colorado River to South Gila Levee.

q. South Gila Levee (including Main Outlet Drain Extension). Location shown by drawing No. 35-300-48.

r. Gauging Station. Location shown by "blue" pencil mark below the letters "ol" in the word "Seminole" on Drawing No. 35-300-48, below the Winterhaven townsite.

Provided, however, that should any of the above works (excepting the works described in subparagraphs a., d., and j. hereto), be abandoned or cease to be used in connect with authorized Reclamation projects by the United States as determined in writing by the Secretary of the Interior equitable title therto shall revert to the Tribe, in all instances where the Tribe owns equitable title to lands immediately adjoining said works. A survey of the location and extent of the areas occupied by the works referred to above and the material sites referred to in paragraph 7 below will be made as promptly as possible by the United States without cost to the Tribe, and the results of that survey shall be reported to the Tribe, with any dispute thereon referred to the Secretary.

5. There is hereby reserved to the United States, its offi agents, employees, contractors, patentees, licensees, and holders of other rights, the right of ingress to, passage over and egress from Such Lands over existing or relocated roadways at all times for the purpose of exercising the rights specified in this Order and for all lawful purposes in connection with the maintenance and operation of all Reclamation works; provided however that new roadways will not be constructed on reservation lands without consent of the Tribe, and that existing roadways may be relocated by the Tribe at its own expense so long as they are adequat for the purposes served by the original roadway.

6. The Tribe's equitable title to Such Lands within the flood plain of the Colorado River, including Laguna Dam South Recreational Area, shall be subject to the rights of the United States under the Act of June 28, 1946, 60 Stat. 338. The Tribe shall not construct or install or permit the construction or installation of any permanent improvements on Such Lands within the flood plain or floodway as shown by "red" coloring on Drawing No. 423-300-1036 (Bureau of Reclamation, Flood Plain Information--Colorado River-Imperial Dam to San Luis, Plate 3 (August 1973)), attached hereto and incorporated herein by reference, nor will the Tribe permit said lands to be used in any manner inconsistent with or contrary to the purpose or intent of Executive Order No. 11296.

7. There is hereby reserved to the United States the right to continue in exclusive possession of all presently used material sites located within the now-recognized reservation boundaries, of sand, gravel, fill, clay and rock necessary for operation and maintenance of its project works, provided however that if the sites are abandoned or the use thereof is changed in any substantial manner by the United States, possession shall revert to the Tribe at its option. Provided further that the United States shall pay to the Tribe the fair market value of any and all materials removed from these sites from and after the date of this Order, and shall make regular periodic reports to the Tribe concerning the value of all materials removed.

IV. MISCELLANEOUS PROVISIONS

1. Nothing contained herein shall prevent the Tribe from recovering whatever compensation it may be determined is appropriate in any proceeding now pending or hereafter brought against the United States for past use of Such Lands.

2. Any claim for water rights in addition to that amount presently enjoyed under Arizona v. California, asserted in relation to Such Lands will be predicated only upon the criteria heretofore employed in Arizona v. California.

3. This Order determines the respective interests to Such Lands of the United States and the Quechan Tribe, subject to the provisions of Paragraph III of this Order. This Order does not affect any claim of the State of Arizona or the State of California or any successor of interest thereof may have to Such Lands.

4. All permits, patents, leases, rights of way and other rights and interests to Such Lands in existence on the date of this Order which are not enumerated or are not correctly enumerated in Paragraph III (2) of this Order shall, upon submission to the Office of the Secretary of the Interior and the Quechan Tribal Council, within 90 days of this Order be corrected or added to the enumeration in said Paragraph if determined to be valid by the Secretary after having given notice and an opportunity to be heard to the Quechan Tribe.

5. All agencies of the Department are hereby directed promptly to take all necessary steps to implement the Opinion of the Solicitor and the terms of this Order.

Secretary of the Interior

Attachments

EXHIBIT 2

54.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

DEC 20 1978

Memorandum

To : Secretary

From : Solicitor

Re : Title to Certain Lands Within the Boundaries of the Ft. Yuma (now called Quechan) Indian Reservation

The Quechan Indian Tribe, the Bureau of Indian Affairs, 1/ and the Chairman of the Senate Committee on Interior and Insular Affairs, 2/ have requested this Department to reconsider the legal question of whether the Quechan Tribe retains ownership of approximately 25,000 acres of non-irrigable land within the boundaries of their 1884 Executive Order Reservation. This question has been considered on two previous occasions by the Solicitor, resulting in the issuance of opinions in 1936 (M-28198), and 1977 (M-36886), which have concluded that title to this land was unconditionally ceded to the United States by virtue of a negotiated 1893 cession agreement and an 1894 statute, ratifying such agreement. (28 Stat. 332).

Prior to the issuance of the 1977 Solicitor's opinion, a draft Solicitor's opinion to the opposite effect was widely circulated. That opinion concluded that the 1893 agreement and 1894 ratifying statute provided for a conditional cession of the non-irrigable lands, that the conditions were not fulfilled, and that the cession of the non-irrigable lands had therefore not been effected. Department files on this subject reveal that the draft opinion was seriously considered, and that extensive preparations were made for the issuance of a decision in favor of the tribe. The February 1976 decision by the Solicitor upholding the 1936 opinion was an unexpected event. The Senate Subcommittee on Indian Affairs held

1/ Memo of November 15, 1977, from Acting Assistant Secretary for Indian Affairs to Associate Solicitor for Indian Affairs.

2/ Letter of February 8, 1977, from Senator Henry Jackson to Honorable Cecil Andrus, Secretary of the Department of the Interior.

EXHIBIT 3

hearings in May and June of 1976, to air the controversy and learn the legal basis of the 1976 decision by the Solicitor. In those hearings, the Secretary agreed to direct the Solicitor to prepare a written legal opinion supporting the 1976 decision. A written opinion, M-36886, was published on January 17, 1977.

The sharp and continuing divergence in legal views with respect to this issue have persuaded me that the matter merits reconsideration. Accordingly, I directed review of the Department's files and all previously prepared legal opinions to provide an independent evaluation of the Quechan claim to the 25,000 non-irrigable acres.

Having reviewed that evaluation, I conclude that the 1893 agreement and 1894 ratifying statute provided for a conditional cession of the non-irrigable acreage. The conditions articulated in the agreement, which included the allotment and irrigation of irrigable land to the Indians, the sale of surplus to settlers under strictly prescribed conditions, the construction of an irrigation canal, and the opening of non-irrigable lands to settlement, were not met by the United States. No lump sum, or other form of compensation, was provided for the land cession. Allotment and irrigation did not occur on the reservation until Congress passed a 1904 statute (33 Stat. 189) which applied the Reclamation Act to the Ft. Yuma and Colorado River Reservations. The 1904 Act appears to be totally unrelated to the 1893 cession agreement, except for mention of it in the legislative history as part of the explanation of the continuing lack of irrigation on the reservation. In short, the conditional cession in 1893 was never effected and the title to the non-irrigable acreage, therefore, remains in the Tribe.

The records of this Department reveals that the non-irrigable lands were administered as tribal lands until the 1936 opinion of Solicitor Margold. See footnotes 8 and 9, infra, detailing the numerous occasions on which actions were taken by the Department during that period on the basis that these were Indian lands.

In the more than forty years since this Department first ruled that the land in question did not belong to the Quechan Tribe, third parties have acquired various interests such as easements or rights of way. Some of these interests existed prior to the establishment of the reservation, some were granted by Congress and still others were granted by Bureaus in this Department. My recognition of title in the Quechan Indians is subject to these valid third party interests. The Quechan Indian Tribe has previously recognized that their title will be subject to each of these third party interests and also to lands taken by the United States for reclamation purposes.

Background Facts

(3) The Fort Yuma Reservation was created by executive order on January 9, 1884. (1 Kappler, Indian Affairs—Laws and Treaties 832.) In 1893, the Quechan Indians sent a petition to the President and to Congress in which they indicated a willingness to cede their rights in their reservation in return for receiving allotments of irrigated land. (4) (S. Exec. Doc. No. 68, 53rd Cong., 2d Sess. 14-16 (1894)). The Indians expressed belief that they would improve economically if they had smaller, individual units of irrigated land, suitable for farming. In 1893, an agreement was negotiated providing for the allotment of irrigable lands, the sale of surplus irrigable lands under strictly prescribed conditions, the holding of sale proceeds in trust for the tribe and the opening of non-irrigable acres to settlement under the general land laws of the United States. There was no other provision for a lump sum payment or for any identifiable consideration. The agreement (5) was ratified by Congress in 1894 (28 Stat. 332). The ratifying act further provided that construction of an irrigation canal (the right-of-way for which had been granted in an 1893 statute) would have to be commenced within 3 years of the date of passage of the act or the right-of-way would be forfeited. In addition, each adult male was to receive free water for 1 acre of his allotment over a 10-year period.

During the following decade, allotment did not occur, the President did not proclaim the non-irrigable lands a part of the public domain and open to settlement, and the irrigation canal was not built. Then, in 1902, Congress passed the Reclamation Act. In 1904, mindful of the continuing and unsatisfied need for irrigation on both the Fort Yuma and Colorado River Reservations, Congress passed an Indian Appropriations Act which extended the benefits of the 1902 Reclamation Act to those two reservations, and which provided for the allotment of irrigable land to tribal members and for the sale of surplus irrigable lands to (6) non-Indians (33 Stat. 224). The terms under the 1904 Act for the sale of surplus lands and for holding of proceeds differed significantly from those in the 1893 agreement and 1894 ratifying act. The 1904 Act was (7) amended in 1911 to increase the allotments to 10 acres. (36 Stat. 1063.) Allotment of irrigable lands was completed by 1912. The irrigable lands were fully disposed of by 1949. The 25,000 non-irrigable acres were not returned to the public domain, opened to settlement and disposed of. They are the subject of this opinion. While the majority of these lands continue to be non-irrigable, it is estimated that between 5,000 and 5,500 acres, the bulk of which are in California, are "practicably" irrigable.

Legal Analysis - 1893 Agreement and 1894 Statute

The resolution of the title question turns, I believe, on the correct interpretation of the 1893 agreement and the ratifying statute. Case law establishes that when interpreting federal agreements and statutes pertaining to Indian affairs, one must consider the legislative history, as well as surrounding circumstances and subsequent administrative practices, to determine what the parties intended, and in particular, what the Indians understood the agreement to mean. In so doing, doubtful expressions are to be resolved in the Indians' favor. 3/ Clearly, such interpretative approach is appropriate in a case such as this where the trustee is examining and interpreting a transaction involving valuable assets of its ward, and in which the trustee is the other party to the transaction, who stands to gain from the disposition of the assets other than to the tribe. As stated in the case of Navajo Tribe v. United States, 364 F.2d 320, 322, 323 (Ct. Cl. 1966):

> Since the Department of the Interior had an obligation to safeguard the property of the Navajos when they were dealing with third parties, it is clear that an even greater duty existed when the Department itself entered into transactions with the Indians . . . . Because of this and because of the Government's special duty toward the Indians, the various dealings must be carefully scrutinized.

Neither the agreement nor the ratifying statute is sufficiently clear with regards to the cession of the non-irrigable lands to compel one interpretation over another. The actual language of the cession Article is:

> Article I. The said Yuma Indians, upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, title,

3/ Menominee Tribe v. United States, 391 U.S. 404 (1968); United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941); Antoine v. Washington, 420 U.S. 194 (1975), Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). The conclusions of this opinion flow from premises which differ from those in the 1936 and 1977 opinions in two fundamental respects: (a) a finding that the documents, rather than being clear, contain ambiguities in critical areas; and (b) canons of construction applied here are those which are uniquely applicable to controversies involving Indian rights as opposed to those which may apply to controversies generally.

> claim, and interest in and to and over the following described tract of country in San Diego, California, established by executive order of January 9, 1884, which describes its boundaries as follows. . .. (Emphasis added.)

The remaining articles of the agreement provide for the allotment of irrigable lands to Indians, the sale of surplus irrigable lands to settlers, the manner in which such sale was to be conducted and proceeds thereof handled, the issuing of trust patents and the opening of lands, not subject to irrigation, to settlement.

In Article I, there is an apparent conflict of meaning, with regard to timing of the cession, between the phrase, "upon the conditions hereinafter expressed" and the phrase, "do hereby surrender and relinquish." Also, the remainder of the agreement does not list conditions or governmental duties, describing them as such; this makes it difficult to discern from the face of the document, which of the Articles contain conditions or compensation which might affect the relinquishment. Article VI, the only article specifically relating to the non-irrigable lands, merely provides for the future opening of such lands to settlement—suggesting a session in trust, i.e., a session solely for purposes of permitting the United States to act as broker with respect to those lands. See Ash Sheep Co. v. United States, 253 U.S. 159 (1920). The corresponding provision in the ratifying statute provides that the non-irrigable lands shall become a part of the public domain, and shall be opened to settlement by Presidential proclamation. The language is in the future tense and requires executive action. Lastly, while the Article providing for the sale of irrigable lands provides for holding proceeds for the tribe, there is no corresponding arrangement expressed regarding the sale of non-irrigable lands. This raises the question of whether the same arrangement was intended, or understood, for the non-irrigable lands.

Under these circumstances the language is not clear and unambiguous on its face. It is not clear to me, from the cited language, that the Indians immediately ceded title to all their reservation lands, for no money whatsoever, and without actual performance of certain acts by the United States government.

Because the language of the agreement and statute is not clear, it is necessary to resort to rules of interpretation. I am aware of the general principles of contract law which favor the construction of provisions of contracts as promises rather than conditions, 3A A. Corbin, Contracts, §635 (rev. ed. 1960); 5 S. Williston, A Treatise on the Law of Contracts, §665 (W.H.E. Jaeger ed. 1961), and the general principles of real estate law which favor covenants over conditions. See 2 R. Powell, The Law of Real Property, §§187, 188 (1974); cf. I American Law of

Property, §2.8 (1952); 5 id. § 21.3(a). Technical rules of conveyance should not be applied in the construction of agreements between the Indians and the government. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970). Rather, as noted above, the focal point of such construction is the intent of the parties. Thus, when construing another cession agreement containing conditional language, the Supreme Court examined legislative history, contemporary statements by tribal members, actual benefits delivered to the tribe (i.e., lump sum payment) and subsequent treatment of the lands. DeCoteau v. District Court, 420 U.S. 425 (1975). In finding that an immediate cession was effected, in spite of seemingly conditional language, the Supreme Court relied heavily on the facts that a sum certain was paid for the lands and that there was no evidence that the lands were subsequently administered as Indian lands. (DeCoteau, supra at 448). Furthermore, the Court examined numerous contemporaneous accounts of the cession, which showed that at least some Indians believed they had sold their land.

The background information in this case is quite different from that in DeCoteau. The legislative history indicates that the main purpose of the Agreement — from the standpoint of the Indians who signed it, 4/

4/ In a post-Agreement letter from the Indians to the President and Congress, the Tribe explained why they were willing to cede their lands:

> We believe if furnished with a small tract of land, with water to irrigate it and with the means of cultivating, we could improve our fortunes to the extent of securing at least all the necessaries of life. We believe if the land now embraced in our reservation could be thrown open to settlement an irrigating ditch would be built through the reservation. . . . While with water the soil is fertile, nothing will grow without irrigation, for there is no rain. Hence we want the ditch built so that we can get water and have early and large crops like our white friends. We are willing to give up a large part of our reservation because as it is it is worthless to us, if we can have small tracts set apart for our use.
> (Emphasis added).

53rd Congress, 2d Session, Senate Ex. Doc. 68 at 14-15.

EXHIBIT 3

and the Congress that ratified it 5/ — was to provide irrigation to the reservation. Indeed, in the 1894 statute, Congress added statutory provisions concerning the construction of a canal requiring that it be commenced within 3 years or the right of way previously granted would be forfeited. The Indians perceived farming irrigated allotments as the key to acheiving their goal of economic improvement and they offered to cede their reservation in return for irrigated allotments, perhaps believing they had to do so to entice government action (since the negotiation of cession-allotment agreements was a prevailing practice at that time). There is no evidence that obtaining money as the desired compensation was considered by the Indians.

Evidence of either the government's or the tribe's intent regarding the non-irrigable lands is inconclusive. There is nothing to suggest that the government wanted to acquire the non-irrigable lands. In the negotiated agreement, the government did not specify any compensation for the non-irrigable lands, whereas it did clearly provide compensation for any irrigable lands that would be removed from Indian ownership. This is a particularly troublesome point because the cession agreement was negotiated pursuant to the General Allotment Act which authorized the government to negotiate for the cession of surplus Indian lands, upon just and equitable terms. (24 Stat. 389, §5, 25 U.S.C. §348). This failure of compensation for the non-irrigable lands seems a crucial "oversight" of the agreement.

To be sure, Congress could have simply taken the non-irrigable lands under Article VI of the Agreement with no compensation. 6/ However, evidence of such intent is not obvious. First, the Government had

5/ The paramount reason for the proposed Agreement is found in the proposition of the Colorado River Irrigating Company to furnish the Yuma Indians with water for irrigation purposes. 53rd Congress, 2d Session, House Report No. 1145, at 2. See also Senate Ex. Doc. 68, supra. Later legislative history affirms this view of the 1894 Act. 58th Congress, 2d Session, Senate Report 1660.

6/ The courts have held that Congress (or the executive, for that matter) could constitutionally take the land of an executive order reservation even without providing the tribe any compensation. Sioux Tribe v. United States, 316 U.S. 317 (1942); Hynes v. Grimes Packing Co., 337 U.S. 86, 103-104 (1949). The result of these cases, however, was not clearly anticipated in 1904. Cf. 34 Op. A.G. 181 (1924); 13 L.D. 628 (1891); 12 L.D. 205 (1890).

proceeded by agreement with the Indians. Secondly, the Agreement and statute were intended to implement the General Allotment Act, which authorized the Secretary to negotiate with Indians for the cession of their lands only under such terms as were "just and equitable." Congress and the Department, it seems, were acting more in their guardianship capacity, 7/ and not in a confiscatory manner.

There is, moreover, nothing in the history of that time indicating that the government had any particular interest in acquiring the lands in question. By contrast, in the case of the cession agreement construed in the DeCoteau case, there was evidence of strong pressure by non-Indian settlers on the government to acquire particular Indian lands so that the settlers could move in. Not only is evidence of such pressure totally lacking in this case, but the government's failure to ever open the land to settlement strengthens the impression that no one was very interested in, much less had specific designs on, the land.

There is a similar lack of evidence as to how the Indians understood the agreement to affect the status of the non-irrigable lands. It must be remembered that Article VI of the agreement did not refer to the cession or sale of non-irrigable lands, nor did it state they were returned to the public domain. It merely stated they would be opened to settlement. One might assume that because the Indians expressed interest in farming irrigated land, that the Indians were as disinterested in the non-irrigable land as was the government. But, whether the Indians understood that they had casually given away such land, without any apparent compensation, and without retaining any interest therein, is a further assumption for which there is simply no evidence and, therefore, which we are not justified in making. Belief that non-Indian settlement on such lands to be a benefit to the Indians and, therefore, a condition of, or compensation for the cession of such lands, in strict technical sense, a possible theory supporting an immediate session. However, it is not clear that these Indians—who were not versed in either the English language or such a sophisticated concept—understood that they would be giving up valuable real estate in exchange for the "privilege" of having non-Indian settlers as neighbors on their reservations.

In addition to the lack of payment, and the lack of evidence that the parties intended the transfer of the non-irrigable lands, this case differs sharply from that in DeCoteau and in Rosebud, in that the

7/ Shoshone Tribe v. United States, 299 U.S. 476 (1937); United States v. Creek Nation, 295 U.S. 103, 109-110 (1935); Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919); United States v. Lynah, 188 U.S. 445, 462 (1903).

Department of Indian Affairs continued to administer the non-irrigable lands in trust for the tribe in the granting of leases and permits and in holding rents in trust for the tribe.

The results of an intensive file review, conducted in 1975 by staff of the Solicitor's Office and detailed below, show a clear and basically consistent history of administration of the non-irrigable lands by the Bureau of Indian Affairs prior to the 1936 Solicitor's Opinion. This administrative history was acknowledged in the 1936 Opinion. Maps of the area issued between 1894 and 1936 include the Fort Yuma Indian Reservation and depict its boundaries as declared in the 1884 Executive Order. 8/ The Bureau of Land Management's plat records, as well as the

8/ E.g., U.S.G.S. map, "Colorado River from Black Canyon, Ariz.-Nev. to Arizona-Sonora Boundary," surveyed in 1902 and 1903 (Exhibit RO-13, Quechan Tribe v. United States, Indian Claims Commission Docket No. 320 [hereinafter cited as Claims Exhibit ____]); U.S.G.S. map "Yuma Quadrangle, California-Arizona," edition of April 1905 (BIA Files, Phoenix); 1936 reprint of April 1905 U.S.G.S. map (Claims Exhibit RO-13); U.S. Reclamation Service maps of the Yuma Project in its annual reports to Congress (e.g., Third Annual Report: 1903-04, at 192-193 (2d ed. 1905); Fifth annual Report: 1906, at 100-01 (1907)); U.S. Reclamation Service Map No. 16774 (January 1916) (Yuma Project File 154-D, A610158; File 154, "Lands-General," A609223); U.S. Reclamation Service Map No. 17471 (1917) (Yuma Project File 154, "Lands-General," A609224, 2-328). The latter two maps, which were produced after issuance of the Indian trust allotment patents on February 5, 1914, show the Indian Allotments (or Indian Unit) and continue to depict the entire area encompassed by the 1884 Executive Order as the Yuma Indian Reservation. The field notes, reports and official plat of survey prepared by General Land Office Surveyor John L. Warboys between 1931 and 1934, as well as the underlying assignment instructions (Special Instructions Group 264, California) repeatedly refer to, affirm and adopt the "West Boundary of the Yuma Indian Reservation" as described in the 1884 Executive Order and fixed by the Ingalls survey in 1895; and General Land Office Special Instructions Group 281, relating to T. 16 S., R. 23 E., S.B.M., dated April 15, 1932, refers to "that portion of the Yuma Indian Reservation lying between the Reclamation Levee and the abandoned channel of the Colorado River" (Claims Exhibit RO-13 and supporting documents). Additional maps recognizing the continued existence of the reservation as described in the 1884 Executive Order are listed in note 9 infra.

original documents signed at the Secretarial level, show that all rights of way issued by the Department across the non-irrigable lands (except those which may have been issued by the Bureau of Reclamation within its own rights of way) were issued under statutory authority pertaining to Indian reservations. 9/ The Commissioner of Indian Affairs issued

9/ "Map of the Definite Location of the Southern Pacific Railroad in the Yuma Indian Reservation, California," G.L.O. no. 506131-1915, surveyed December 1906, submitted to the Indian Agent, Yuma Indian Reservation, March 13, 1907, and approved by Acting Secretary of the Interior George W. Woodruff on June 18, 1907, subject to the provisions of the Act of March 2, 1899 (30 Stat. 990, as amended, 25 U.S.C. §§ 312-18) (BIA Files, Phoenix) (the BLM plat records for section 36, T. 16 S., R. 22 E., Record issuance of another right-of-way to the railroad under the 1899 Act, with jurisdiction in the BIA on July 29, 1926 (R. 1359, S 3492)); "Map of the Definite Location of the Inter California Railway in Yuma Indian Reservation, California," received by Superintendent Egan, Yuma Indian Reservation, September 30, 1909, and approved by the Department February 10, 1910, under the Act of March 2, 1899, with the schedule of compensation to the Indians required by that act being approved by First Assistant Secretary Frank Pierce on May 14, 1910, pursuant to the recommendation of Superintendent Egan and Commissioner of Indian Affairs Valentine (BIA Files, Phoenix); "Proposed Telephone and Telegraph Line Crossing the Yuma Indian Reservation," Pacific Telephone and Telegraph Company, Right of Way Map LA 011977, approved by First Assistant Secretary of the Interior A.A. Jones on July 3, 1913, pursuant to the Act of March 4, 1911 (36 Stat. 1253, as amended, 43 U.S.C. § 961), with the requisite finding for Indian reservation lands of compatibility with the public interest being made by the First Assistant Secretary by notation on the July 2, 1913, memorandum from the Second Assistant Commissioner of Indian Affairs to the Secretary recommending approval, and with rental, payable to the account of the Quechan Tribe, being set at $8.66 for the first year (Claims Exhibit RO-3) (related documents show the rental fee was collected on behalf of the Tribe for the full 50 year term of the right of way); "Center Line Location Map of Proposed Highline Canal from Laguna Dam to Imperial Valley and Location of Power Plant," dated June, 1915, showing the reservation boundaries as established in 1884, submitted for the approval of the Secretary of the Interior pursuant to sections

(Footnote 9 continued)

18-21 of the Act of March 3, 1891 (26 Stat. 1095, 1101-02, as amended, 43 U.S.C. §§ 946-49), section 2 of the Act of May 11. 1898 (30 Stat. 404, as amended, 43 U.S.C. § 951), and the Act of February 15, 1901 (31 Stat. 790, as amended, 43 U.S.C. §959), all of which authorize rights of way through Indian reservations as well as public lands (BIA Files, Phoenix—no indication as to whether the right of way was approved); Memorandum dated June 6, 1917, from Assistant Commissioner of Indian Affairs Meritt to Commissioner Tallman of the General Land Office, responding to the latter's request for a report on the application of the Coachella Valley Ice and Electric Company for a right of way for an electrical transmission line across Yuma Indian lands (all in the non-irrigable western portion of the 1884 reservation), advising that "the proposed right of way involves no Indian allotments but crosses a portion of the Yuma Indian Reservation which is absolutely waste desert land and upon which no Indians reside," and recommending approval of the application with an annual charge of $5 per mile as compensation for damage to the Yuma Indian Reservation lands involved (BIA Files, Phoenix); "Proposed State Highway Through Yuma Indian Reservation," California Highway Commission, dated July 16, 1923, as amended by maps of changes "A" through "D", dated September 28, 1923, through May 1924, approved by Assistant Secretary of the Interior John H. Edwards on October 10, 1927, subject to the provisions of the Act of March 3, 1901 (31 Stat. 1058, 1084, 25 U.S.C. § 311), and amending the right of way as originally approved under the same act on November 9, 1917 (Claims Exhibit RO-8; BLM Plat Records, Sacramento): Order of withdrawal and reservation of a right of way for a proposed Reclamation Servic "power canal from siphon drop to Araz" across the Yuma Indian Reservation, withdrawing and reserving 236.05 acres of reservation land, of which approximately 3.5 acres were allotted lands, recommended by Director and Chief Engineer Davis of the U.S. Reclamation Service on April 15, 1918, concurred in by Assistant Commissioner of Indian Affairs Meritt on the "understanding that adequate compensation be assessed and paid for damage to Indian lands involved," concurred in by Commissioner Tallman of the Gener Land Office, and approved on June 17, 1918, by Assistant Secretary of the Interior S.G. Hopkins under sections 13 and 14 of the Act of June 25, 1910 (36 Stat. 855. 858, 43 U.S.C. § 148, 25 U.S.C. § 352) (Yuma Project File 150, Purchase of Lands-General, 1909

trader's licenses to occupy and use non-irrigable land on the reservation, near the western boundary until the issuance of the 1936 Solicitor's Opinion. 10/ Sand and gravel leases were issued by the Bureau of Indian Affairs on tribal unallotted lands within the Yuma Indian Reservation from at least 1929 to 1936 pursuant to section 26 of the Act of June 30, 1919 (41 Stat. 31, as amended, 25 U.S.C. § 399). The tracts which were described were all non-irrigable lands in the western portion of the reservation. 11/

(Footnote 9 continued)

thru June 1919," A606156, A606163, A606167-68); "Southern Pacific Railroad Station Grounds" map received by the Superintendent of the Yuma Indian Reservation June 30, 1928, and approved by the Department on December 18, 1928, pursuant to the Act of March 2, 1899, supra (Claims Exhibit RO-11; BLM Plat Records, Sacramento). The Bureau of Land Management plat records in Sacramento, California show three additional rights of way issued under statutes governing Indian reservation lands and noted as being under the jurisdiction of the Bureau of Indian Affairs; a highway right of way, R 2704, issued October 24, 1930, under the Act of March 3, 1901, supra, a telephone and telegraph line right of way, S 3489, issued June 14, 1927, under the Act of March 3, 1901, supra, and a transmission and telephone right of way, LA 040525, issued March 23, 1927, under the Act of February 15, 1901, supra.

10/ Trader's License covering 80 acres in the N/2 of the NW/2, section 25, T. 16 S., R. 21 E., S.B.M., issued to Robert M. Goebel January 1, 1928, to James H. Maxey August 6, 1929, and thereafter to Maxey and later his widow, Mary A. Maxey, through various renewals (BIA Files, Phoenix).

11/ Letter dated June 18, 1935, from the Commissioner of Indian Affairs to Superintendent Jolley, Fort Yuma Agency; Letters dated December 13, 1939, and April 6, 1943, from Superintendent Gensler, Colorado River Indian Agency, to the United States Fidelity and Guarantee Company; Letter dated March 29, 1943, from BIA Field Agent Cox, Fort Yuma Sub-Agency, to Superintendent Gensler; Letter dated November 18, 1934, from H.L. Gardner to the Quechan Tribal Council; Letter dated August 3, 1934, from H.L. Gardner to Superintendent Jolley,

(Footnote 11 continued)

Fort Yuma Indian Agency; Notices of location of placer mining claims by Rosa Lee Black and Patsy Black on February 26, 1935, filed with the Fort Yuma Indian Agency on March 18 and April 2, 1935, within 60 days of location as required by the 1919 Act (BIA Files, Phoenix, Claims Exhibits RO-4, RO-12, RO-15).

There is no record of management of the non-irrigable areas by the Bureau of Land Management prior to 1936. Only one document even hints at such management by the Bureau of Reclamation. On October 28, 1953, an "Analysis of G.L. Account 271.22—Rental of Farming and Grazing Lands" was prepared to ascertain the portion of "Miscellaneous Non-operating Income—Other" attributable to the rental of grazing and farming lands covered into such account between 1910 and 1953. The entries are jumbled and clearly inaccurate in places. The covering memorandum states that "some of the income . . . was from Mining and Gravel Leases, and still a larger portion from lands lying outside both irrigation divisions. Probably all of the Mining and Gravel leases, as well as a sizeable portion of the Grazing and Farming leases, lie outside the two irrigation divisions." An inspection of the entries confirms that all of the leases listed in the "Gravel and Mining" column were on non-irrigable reservation lands, except perhaps Lease I24r-358 issued to Emil Frank. But all of them are entered in the ledgers after 1940, and most, if not all of them, are almost surely the same sand and gravel leases that were administered by the Bureau of Indian Affairs prior to 1936. See, e.g., leases I24r-417 and I24r-504 issued to H.L. Gardner and the leases issued to C.H. Trigg and Emil Frank and compare them with the BIA leases issued to the same persons as described in the documents referred to in the preceding paragraph of this note. Similarly, all the leases except for one listed in the "Outside Area" column, although covering non-irrigable portions of the reservation, were entered in the ledgers after 1936. See, e.g., lease I24r-415 issued to Mary E. Maxey for a gas station and lease I24r-456 issued to Callahan Construction Company for a "Piece of Ground at Pot Holes" (a site in section 25, T. 15 S., R. 23 E.). The Mary E. Maxey lease, inaccurately placed in T. 15 S. rather than T. 16 S. of R. 21 E., is undoubtedly a lease for the same ground that was utilized by Mrs. Maxey under a BIA trader's license prior to

(Footnote 11 continued)

1936. See the documents referred to in note 10 supra. The one exception is lease L-30 issued to R.E. Whitmore and S.H. Flood and listed as an "Outside Area" between 1918 and 1924. However, the land description (section 19, T. 16 S., R. 23 E. and section 35, T. 15 S., R. 23 E.) includes both irrigable and non-irrigable lands, and the lease is actually listed (under Whitmore's name) for the period from 1925 to 1927 and again in 1928 in the "Reservation" Division column, which covers the irrigable lands in the Reservation Division of the Yuma Project. The "Outside Area" listing was therefore, probably an error. The term "Reservation Division" described the irrigable lands and project works of the Yuma Project on the California side of the Colorado River, as several of the maps referred to in note 8 supra indicate. It did not cover the non-irrigable reservation lands not used for project works. Hence the use of the "Outside Area" column in the account analysis. A study of all of the entries in the "Reservation [Division]" column shows that all of them included irrigable as well as non-irrigable lands, and the leases were no doubt for a portion of the irrigable lands. The land descriptions in the analysis ordinarily give at most the section in which the lease was contained, without providing any more precise description. Where more precise descriptions are given, they refer to specific lots or farming units in the Bard area opened to non-Indian settlement in 1910. See, e.g., leases I1r-372, L-14, and 4-11. Other leases are in sections which are entirely, or practically entirely, irrigable. See, e.g., leases I24r-202, I24r-305, I24r-307, I24r-354. Lease I24r-409 was for a "track on levee in Cal. in Res. Div." One lease whose land description defies accurate interpretation is the lease originally issued to E.F. Sanguinetti under lease number I24r-169 and described as sections 31,36,1,6 in townships 15,15,16 and ranges 23, 22E. It is not clear which sections are to be matched with which townships and which ranges. Some of the probable combinations would include sections which contain only non-irrigable lands, but all of these would also contain substantial project works, except for section 6, T. 16 S., R. 22 E., which is high up in the rocky mesa and useless for farming or grazing. Considered as a whole, however, the account analysis supports BIA jurisdiction over the non-irrigable lands prior to 1936.

In addition to this formal evidence of administration, there are many informal recognitions of the continued inclusion of the non-irrigable lands within the Indian reservation. Both the Commissioner of Indian Affairs and the Director of the Reclamation Service described the Yuma Project as encompassing only "the bottom lands in the Yuma Indian Reservation," 12/ and the chief officers of the two bureaus repeatedly referred to the non-irrigable lands as "Indian country within the meaning of the law," 13/ "Indians lands . . . [which] are not public lands in the ordinary sense of the word," 14/ and lands the disposal of which "is primarily within the control of the Indian Office." 15/

12/ Fifth Annual Report of the Reclamation Service: 1906, at 100 (1907) (emphasis added); Letter dated February 28, 1906, from the Commissioner of Indian Affairs to the Secretary of the Interior (Yuma Project File 154-A, "Indian Lands," A609694). A letter dated July 18, 1913, from Reclamation Service Yuma Project Engineer Sellew to supervising engineer Hill enclosed three prints of a map showing "the entire Indian Reservation," including as one subdivision thereof "the area allotted to the Indians, amounting to about 8,200 acres" (Yuma Project File 154-A, "Indian Lands, 1910 thru June 1919," A609380, A609382-84).

13/ Letter dated October 1905, from Acting Commissioner of Indian Affairs Larabee to the Director, U.S. Geological Survey (in which the Reclamation Service was originally located), concerning police jurisdiction over the non-irrigable lands on the California side of the Colorado River being used for construction of the Laguna Dam (Yuma Project File 154-A, "Indian Lands," A609664-65).

14/ Copy of memorandum dated March 21, 1925, from Acting Chief Engineer Crowe, Bureau of Reclamation, to the Commissioner of Reclamation, concerning an application by Southern Sierras Power Company for a right of way "west of the east line of Sec. 19, T. 16 S., R. 22 E., S.B.M.," which would be "across Indian lands over which the Bureau of Reclamation has proposed to construct certain works in connection with the All-American Canal to Imperial Valley." (Yuma Project File 430, "Acquisition of Lands, Indian Lands thru 1929").

15/ Letter dated June 23, 1914, from Director Newell, Reclamation Service, to U.S. Representative Carl Hayden (Yuma Project File 154-A, "Indian Lands, 1910 thru June 1919," A609414).

More particularly, the non-irrigable lands between the reservation levee and the Colorado River are expressly recognized as being reservation lands subject to the jurisdiction of the Indian Bureau, except insofar as such lands were necessary for the protection of the levee. In a letter dated May 28, 1906, District Engineer Homer Hamlin advised the Director of the U.S. Reclamation Service that "[t]he jurisdiction over this land will probably always remain with the Indian Bureau, as it will not be reclaimed or sold as a part of the cultivable area of the Yuma Project." 16/ In 1907, Superintendent Deaver of the Yuma Reservation raised the question of the status of these lands, as well as the "27000 acres of rough mesa and mountainous land unfit for agricultural purposes," in light of the failure of Congress, in the Act of April 21, 1904, to "provide for the disposition of the balance of the reservation that is not irrigable." 17/ The Secretary of the Interior directed Special Inspector Levi Chubbuck of the U.S. Indian Inspection Service to investigate and report on this and other matters. On April 6, 1907, Inspector Chubbuck reported to the Secretary, suggesting that the strip of land between the levee and the river "be formally reserved by the Indian Office" and that a parallel strip inside the levee which was not to be allotted to Indians or disposed of to non-Indians, as well as "other available places on the Yuma Reservation," be planted with fruit bearing trees, "subject to such regulations as the Reclamation Service desires to impose for the protection of the levees and ditches, the Indians' rights to the income from the products being recognized, in consideration of the fact that the reservation as a whole is theirs." 18/ In 1919, the Director of the Reclamation Service implicitly recognized the right of the Indian Office to irrigate "some lands in Sec. 25, T. 16 S., R. 22 E., which lie outside of our levee and consequently are not included

16/ Yuma Project File 154-A, "Indian Lands," A609709-11. See id. A609702-13 for related Secretarial level correspondence.

17/ Letter dated April 11, 1907, from Superintendent Deaver, Yuma Reservation, to the Commissioner of Indian Affairs, referred by the latter to the Director of the Reclamation Service on May 7, 1907 (Yuma Project File 154-A, "Indian Lands," A609721-28).

18/ Yuma Project File 154-A, "Indian Lands," A609734-39.

within the proposed Yuma project." 19/ And in a letter dated October 20, 1929, the General Land Office advised the Commissioner of Indian Affairs that:

> It is the opinion of this office that the reservation boundary is defined by the center of the abandoned channel (as it existed prior to the avulsive change of 1920) . . . . The area between the levee and the abandoned channel, constituting the present Yuma Indian Reservation boundary, appears therefore to be still in public ownership and a part of the Indian Reservation.

In fact, the jursidiction of the Bureau of Indian Affairs over the non-irrigable lands of the 1884 reservation was not challenged, insofar as the available documents show, until July 15, 1935, during the final stages of approval of the right of way for the All-American Canal. The canal was originally proposed as a private project, passing through the 1884 reservation from the southwest corner to the northeast corner, crossing allotted and unallotted Indian lands, mostly the latter. The entire right of way route was considered to be within the reservation, so that compensation would have to be paid to the Indians for both the allotted and unallotted lands. 20/ When the Reclamation Service decided to construct the canal itself, it shifted the right of way slightly north so that only tribal lands would be involved, and, in a letter dated June 27, 1934, requested the General Land Office to submit the proposed right of way for the canal, which would involve no Indian allotments but rather "exceedingly rough territory along the edge of the Yuma mesa," to the Secretary of the Interior "(through the Commissioner of Indian Affairs) for approval under Section 13 of the Act approved June 25, 1910 (36 Stat. 855, [858, 43 U.S.C. §148])," and act applying to "lands within any Indian reservation" and hence, as the Commissioner

19/ Letter dated October 2, 1919, from Director Davis, U.S. Reclamation Service, to the Commissioner of Indian Affairs (Yuma Project File 150, "Acquisition of Lands, Southern Pacific Ry. Co.").

20/ See, e.g., "Right of Way Plats of the All American Canal through Tribal and Allotted Indian Lands of the Yuma Indian Reservation," dated January 1928; "Schedule of Appraisements Covering Right-of-Way Across Yuma Indian Reservation, Etc.," covering unallotted lands therein, signed April 27, 1928 (Claims Exhibits RO-7, RO-10).

of the General Land Office noted in his transmittal letter to the Commissioner of Indian Affairs dated July 5, 1934, administered by the Office of Indian Affairs. The Commissioner of the General Land Office also stated that "the right of way involves Indian lands." 21/ The Reclamation Service's reversal of position in 1935 seems to have been prompted by its receipt of a report dated March 12, 1935, making substantial claims for compensation and consideration on behalf of the Quechan Indians. 22/ The resulting dispute led to the 1936 Solicitor's Opinion.

Although Congress did not deal with these lands between 1894 and 1936 in any manner which would reveal its understanding of their status, there is a statement in the Congressional Record 23/ by Representative Stephens of Texas on December 6, 1912, approximately two years after Congress enlarged the allotments to 10 acres, and near the time when the canal constructed through the reservation was completed, implying that the "large amount of land up on the mesa" (that is, most of the "non-irrigable" lands which are affected by this Opinion) was in Indian ownership at that time. And, during hearings in San Diego, California, on June 29, 1934, Chairman Wheeler of the Senate Comittee on Indian Affairs referred to "the All-American Canal constructed in connection with the Boulder Dam project and running across the lands of the Indians down there [in the Yuma Indian Reservation]" and told John Curran, a Yuma Indian concerned about compensation for the right of way, "They will have to pay you for it, if they take your land." 24/

21/ Claims Exhibit RO-7. See in addition the Bureau of Reclamation document cited in note 14 supra.

22/ Id.

23/ 49 Cong. Rec. 748.

24/ Survey of Conditions of the Indians in the United States, Hearings before a Subc. of the Senate Comm. on Indian Affairs, pt. 33, 73d Cong., 1st Sess. 17245 (1935). See id., pt. 2, 70th Cong., 2d Sess. 628-29 (1929) (reference to lease of Quechan tribal lands).

Solicitor Austin's 1977 Opinion devotes much effort to establishing that the Department's administrative practices with respect to these lands were inconsistent at best. After carefully reviewing his discussion, it seems clear that the isolated deviations do not alter the fact that this Department treated the non-irrigable acreage as belonging to the Indians.

An example of why the 1977 analysis of administrative practices is unpersuasive can be found on page 29 of that Opinion where Solicitor Austin quotes a 1903 letter from the Commissioner of Indian Affairs on the subject of the non-irrigable lands. The quoted language, however, is taken somewhat out of context as can be seen from the remainder of the Commissioner's discussion which is found in footnote 16. Taken as a whole, the Commissioner's statement does not offer strong support for the proposition that the non-irrigable lands had been ceded. Secondly, Solicitor Austin cited a series of letters by government officials, giving their opinion of the effect of the 1893 agreement. However, such statements appear to me to be more in the nature of gratuitous comments, rather than researched legal opinions, and they do not deal with the essential issue of how the lands were administered. In fact, the comments quoted appear to be confused on the point of whether the non-irrigable lands were public domain lands. And, as Solicitor Austin then stated on page 31 of the 1977 opinion:

> . . .there is a great deal of administrative material that indicates that the subject of non-irrigable lands were administered as Indian lands or were at least, considered to be a part of the Yuma Reservation subsequent to 1894. In some cases, it will be noted that some of the same officers who determined that the Indians had ceded the subject lands also dealt with administrative details pertaining to those lands as though they were Indian lands.

Thirdly, the 1977 Opinion relies strongly on the Warboys survey in 1928 as evidence of the government's view of the current reservation boundaries. However, it has been pointed out that the surveyor's notes 25/

25/ Field Notes of Survey executed by John L. Warboys, under Special Instructions of May 14, 1928, Group No. 152.

indicate that the surveyor was not instructed to or attempting to define the reservation boundaries, as affected by the cession agreement. Moreover, Warboys' comment, cited by Solicitor Austin, only dealt with the status of irrigable lands and not of the non-irrigable lands. Therefore, the survey does little to persuade one that it reflected the government's view of the continuing status of the non-irrigable lands. A last example of the unpersuasive line of argument taken to discredit evidence of administrative practices is the statement that the cession of the non-irrigable lands was not entered on the tract books until the 1960's which may explain why the lands were administered as Indian lands. The non-entry in the tract books does more to suggest that the government did not consider the non-irrigable lands ceded than it does to diminish the impact of administrative treatment as tribal lands.

I am persuaded that the administrative treatment reflects what must have been the prevailing view that the lands had not been separated from the reservation. Even if there were some inconsistency, such inconsistency does not detract from the legal significance of an undeniable pattern of administration of the lands as tribal lands. In any event, neither the executive nor the legislative branches of the government treated the 1893 Agreement and the 1894 Act as having worked an immediate cession of any reservation lands or termination of the reservation. 26/

In conclusion then, it appears far more likely than not, considering the actual language of the documents, the stated purpose of the Indians, the circumstances surrounding the negotiation of the agreement, the fact that the agreement was negotiated under the authority and therefore prescribed compensation terms of the General Allotment Act, and the overwhelming evidence of continuing treatment of the subject lands as reservation lands, that an immediate automatic cession of the irrigable and non-irrigable lands was not intended by either party to the agreement. Rather, it seems more logical that the cession of the reservation lands was contingent upon what the Indians perceived as adequate compensation — allotment to them of irrigable lands, sale of their surplus lands under profitable terms, the proceeds to be held in trust for the Tribe, the construction of an irrigation canal, and the opening of the area to

26/ In 1900, both the Department of the Interior and the President felt it was necessary to issue an executive order (dated December 19, 1900) to withdraw certain lands in the then Territory of Arizona from the reservation by revoking the 1884 Executive Order as to those lands.

settlement. I can find no legal or factual basis for separating the non-irrigable lands from the irrigable lands and deciding that the non-irrigable lands were not subject to fulfillment of such conditions. Indeed, strong argument can be drawn from the non-irrigable acreage section that cession of those lands was specifically tied to the condition that the area be returned to the public domain by executive order, opened to settlement and the tribe compensated as the lands were sold to settlers. 27/

I believe that the foregoing interpretation of the agreement comports with the previously cited canons of construction relating to Indian agreements and statutes, in that it considers all relevant circumstances to determine what the parties intended and it resolves what may be ambiguous in the Indians' favor. Moreover, this interpretation is appropriate in light of the well established legal principle that Congressional action terminating or altering Indian property rights is not to be lightly inferred. Such Congressional intent must be clear. 28/ Indeed, this interpretation is so well founded on the available information that to espouse the opposite interpretation, that the Indians ceded the non-irrigable lands for virtually no consideration, would violate this Department's obligation as trustee to follow an ordinary fiduciary standard in dealing with Indian property rights. Seminole Nation v. United States, 316 U.S. 286 at 279 (1942).

27/ Although the 1894 Act does not provide as detailed a description of the various duties of the government as trustee as was the case in Ash Sheep Co. v. United States, 252 U.S. 159 (1920), some form of trusteeship status may be imputed to the government over the Indian land until the fulfillment of the stated condition. While the 1936 Opinion recognizes that the agreement can be construed as conditional, Solicitor Margold concluded that the opening of the non-irrigable land was not a material condition. But, the fact that the requirement appears in the Agreement and is expanded in the Act indicates its importance to the Indians and to Congress. Otherwise, the parties could merely have stated that the land was ceded to the United States or placed in the public domain. Second, one policy of the General Allotment Act of 1887, 24 Stat. 388, which statute we have been recently told by the Supreme Court is relevant to the understanding of Indian legislation of the period (Mattz v. Arnett, 412 U.S. 481 (1973)), was to further the assimilation of Indian tribes into the non-Indian community. The condition of opening the lands to non-Indian settlement was, then, essentially part and parcel of a primary national policy with respect to Indians at the time.

28/ Menominee Tribe v. United States, 391 U.S. 404 (1968).

As the foregoing discussion of the government's intent regarding the non-irrigable lands has demonstrated, the Government's intent and subsequent administration of the agreement and legislation certainly do not substantiate the interpretation that Congress intended to take title to those lands. There is no room, moreover, for asserting that the conditions of the agreement and ratifying statute were fulfilled, in any way, during the decade following the enactment of the ratifying statute. Therefore, no cession of the reservation lands became effective during that period.

The 1904 Act

The second legal issue on which correct resolution of the title question turns is whether, as the 1977 Opinion holds, the 1904 Act providing an allotment and irrigation scheme for both the Fort Yuma and Colorado River Reservations, was intended to implement the 1893 agreement and ratifying statute by fulfilling the United States' obligations undertaken in that agreement. The 1904 Act does not, as explained below, evidence Congressional intent to fulfill the conditions of the cession agreement and 1894 statute and to execute the cession of all the reservation lands, including the non-irrigable acreage. The case is more compelling, based on the language of the act, as well as its legislative history, that Congress intended to create an entirely new scheme for the irrigation of the area under which there was no cession of "non-irrigable" lands. The language and entire purpose of the 1904 Act were restricted to allowing the "irrigable" reservation lands to be developed under the Reclamation Act of 1902 and the Act should not be interpreted as either a repeal or an implementation of the 1894 statute.

The Act of April 21, 1904, Sec. 25, 33 Stat. 224, states:

> That in carrying out any irrigation enterprise which may be undertaken under the provisions of the reclamation Act of June seventeenth, nineteen hundred and two, and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian reservations in California and Arizona, the Secretary of the Interior is hereby authorized to divert the waters of the Colorado River and to reclaim, utilize, and

> dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain: Provided, That there shall be reserved for and allotted to each of the Indians belonging on the said reservations five acres of the irrigable lands. The remainder of the lands irrigable in said reservations shall be disposed of to settlers under the provisions of the reclamation Act; Provided further, That there shall be added to the charges required to be paid under said Act by settlers upon the unallotted Indian lands such sum per acre as in the opinion of the Secretary of the Interior shall fairly represent the value of the unallotted lands in said reservations before reclamation; said sum to be paid in annual installments in the same manner as the charges under the reclamation Act. Such additional sum per acre, when paid, shall be used to pay into the reclamation fund the charges for the reclamation of the said allotted lands, and the remainder thereof shall be placed to the credit of said Indians and shall be expended from time to time, under the direction of the Secretary of the Interior, for their benefit.

In 1911, the statute was amended to provide for 10-acre rather than 5-acre allotments. Act of March 3, 1911, 36 Stat. 1063.

As in the case of the 1893 agreement and 1894 ratifying statute, the face of the 1904 Act does not compel any one interpretation concerning the effect of the Act on the cession of the non-irrigable lands. The language of the 1904 statute does not refer to the 1893 Agreement or to the status of non-irrigable lands. In fact, the statute does not limit its focus to the Fort Yuma Reservation but includes the Colorado River Reservation. The Act, moreover, authorizes a substantial reclamation project intended to include both Indian and non-reservation lands. The Act states that the Yuma project would take place "in connection with the reclamation of other lands." Furthermore, the 1904 Act, which does not refer to the non-irrigable lands, provides for different allotment and surplus land sale procedures from those agreed to by the parties in 1893 and subsequently ratified by Congress.

The 1894 Act provided for the United States to bear the cost of surveying and appraising the surplus irrigable lands and to sell the lands at public auction with the proceeds from sale of these lands to be placed in a fund, with interest at 5% per annum, for the benefit of the Indians. The 1894 Act also provided that the private canal company, which was given three years to commence construction, must for ten years provide free water for one acre for each male adult Indian utilizing that water for growing crops. The canal company was also to bear the cost of canal construction. The 1904 Act, by contrast, made no provision for free water. It also credited to the Indians only that portion of the proceeds of sale as surplus irrigable land reflecting the value of the land before reclamation. Otherwise, the "surplus" irrigable lands were simply opened to settlement under the homestead laws, rather than being sold by the more favorable procedure of a public auction. The only other charges were for construction of the reclamation projects and these were not payable to the Tribe. Moreover, out of the amount the Tribe did receive under the 1904 Act, there would be taken the sum required to pay the reclamation charges for the land allotted to the Indians, a sharp contrast to the canal being constructed free of charge in the 1894 Act. Any balance remaining was held in a fund for the benefit of the Indians without provision for interest, as contrasted to the five percent interest provided in the 1894 Act.

Reference to the legislative history is helpful and appropriate in construing the scope of the Act. The 1904 Act was proposed by the Department. The Senate Report records in the letter of the Director of the Geological Survey, also read into the Congressional Record, 29/ to the effect that the 1893 Agreement and 1894 Act had created a scheme for irrigation which never was realized, and that Congress was not to be restricted by the prior Agreement and Act, including the failure of the canal venture. This letter made specific reference to two contemporaneous Supreme Court decisions establishing that Congress was not bound by such agreements but "has full power to dispose of the Indian lands in such manner as it may consider best fitted for the benefit of the Indians." 30/ The Senate Report then records a letter from the Commissioner of Indian Affairs which states that:

29/ 38 Cong. Rec. 2811.

30/ Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902) and Lone Wolf v. Hitchcock, 187 U.S. 553 (1902), cited in 58th Cong. 2d Sess., Senate Report No. 1660 at 28.

> The problem of providing these two reservations with irrigation systems is one which this office has thus far been unable to solve, and it therefore gives its hearty assent to the proposition of the Director of the Geological Survey, and earnestly recommends its adoption, believing that it promises relief to these Indians. 31/

A purpose, stated in the legislative history for bringing a reclamation project to the reservation was to construct a "portion" of a "general" and comprehensive system of utilizing the waters of the river to the best possible advantage". 32/

It appears that some material in the legislative history might be susceptible of divergent interpretations. For example, the reference to the Yuma Indians' having already assented to allotments of five acres each ties the 1904 Act to the 1894 statute. But, I think that does little more than indicate what is already clear, that is, that Congress was aware of the 1894 statute. It does not compel the conclusion that the 1904 Act was an implementation of the prior act and cession agreement, with all the ramifications thereof. In addition, the letter from the Director of The Geological Survey, referred to above, might be interpreted as evidence of Congressional intent to implement the Act and cession agreement. But, the discussion in that letter is more susceptible to the interpretation that Congress believed it did not have to take action to acquire Indian land title before disposing of such land. In other words, effectuation of the cession agreement was not at all necessary for Congress to accomplish its stated purpose in 1904, namely provision of irrigation on the reservation as part of a major reclamation project involving the Colorado River. When it is clear that Congress knew it did not have to acquire Indian lands by cession before it could dispose of them, the burden of proving that Congress intended to effectuate a cession becomes more difficult. This is particularly true in the case of these non-irrigable lands which were nowhere mentioned in the Act or in the Director's letter.

31/ Id. at 29.

32/ Id. at 38.

In addition to the legislative history, the administrative practices, detailed earlier in this Opinion, support the interpretation that the title to the non-irrigable lands was not affected by this enactment.

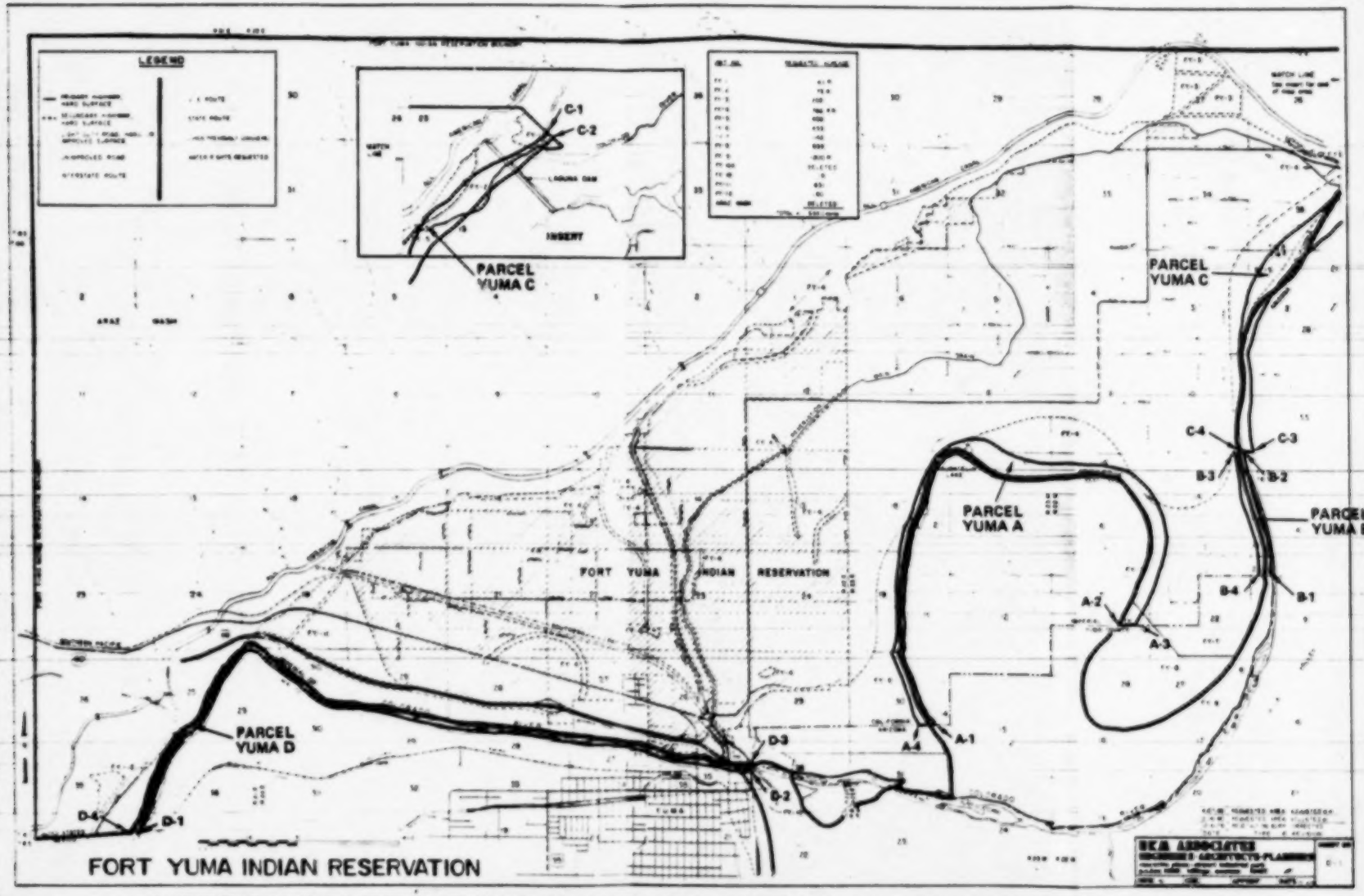
In conclusion, interpreting the 1904 Act as an intended implementation of the cession agreement has little, if any, support in either the language, the legislative history, or subsequent administrative practice. Such interpretation would not conform with the applicable rules for interpreting Indian statutes, 33/ particularly the rule that the cession of Indian property rights may not be lightly inferred. I think the interpretation which follows the language and stated purpose of the 1904 Act most closely is that the Act was not intended to implement and give legal effect to the agreement for the cession of the Port Yuma lands. Rather, the non-irrigable lands were not affected in any practical way by that Act. Therefore, the conditional cession of the non-irrigable lands remained uneffected and title to those lands remains in the Quechan Tribe.

In the preceding discussion, I have explained why I have concluded that the Agreement and the 1894 statute must be construed as providing for a conditional conveyance of the non-irrigable lands; the 1904 Act did not, contrary to the 1977 opinion of the Solicitor, implement the 1893 Agreement and ratifying act. As a consequence, that conveyance was not validly effected. The 1977 opinion is overruled. Title to the subject property is held by the United States in trust for the Quechan Tribe. That title, however, is subject to interests which have vested in third parties as noted above.

Leo Krulitz

LEO M. KRULITZ

33/ See cases cited in footnote 3, supra.



APPROXIMATE BOUNDARIES OF AREAS TO BE EXCLUDED FROM FORT YUMA INDIAN RESERVATION

October 1981 EXHIBIT 4

Headquarters Military Division of the Pacific
San Francisco, Cal. March 12, 1870.

Adjutant General U. S. Army,
Washington, D. C.

Sir:

I have the honor to transmit herewith plats of the following named Reservations in Arizona and request that they may be declared in accordance with the limits herein given.

Camp Mojave

Commencing at a post marked U.S. in a mound of earth situated N. 83° 31' 37" E. 68.99 chains distant from the Flag staff at the Post. Thence variation 14° 08' 28" East. South 33° 08' 28" W 240.00 chains to a post marked U.S. in a mound of sand. Thence N. 56° 51' 32" W. 232.60 chains to a post marked U.S. in mound of coarse gravel. Thence N. 33° 08' 28" E. 240.00 chains to a post marked U.S. in a mound of coarse gravel near the West bank of Beaver Lake. Thence S. 56° 51' 32" E. 232.60 chains to the point of commencement. The said boundaries containing 5582 acres 1 rood 24 perches, a little more or less.

Camp Mojave

Reservation for Hay and Wood.

Commencing at a post marked U. S. in mound of earth situated S. 10° 43' 41" E. 347.52 chains distant from the Flag Staff at Camp Mojave and about 20

EXHIBIT 5

chains S.W. from the point where the road crosses the top of the Mesa. Thence variation 14° 08' 28" East. S. 1° 04' 28" W. 272.50 chains to a post marked U.S. in mound of earth near the Quartermasters Corral. Thence S. 76° 17' 28" W. 228.50 chains to a post marked U.S. in mound of earth near the left bank of the Colorado River. Thence N. 23° 01' 32" W. 362.70 chains to a post marked U.S. in a mound of earth near the left bank of the Colorado River. Thence S. 88° 45' 32" E. 369.00 chains to the post at the point of commencement. The said boundaries containing 9114.81 acres, more or less. And the intermediate tract lying between the Hay and the Post Reservation, bounded on the West by the Colorado River and on the East by a line running from Station I of the Hay and Wood Reserve to Station I of the Post Reserve.

Camp Verde

Commencing at a post in mound of stones situated S. 70° 09' 56" E. 82.16 chains distant from the eastern-most chinmey of the building used as Company Quarters at the Post, and on a rocky bluff near an old Ruin. Thence variation 13° 48' 04" East. N. 31° 11' 56" W. 246.47 chains to a post marked U.S. in mound on South West slope of hill. Thence S. 53° 48' 04" W. 110.00 chains to a post marked U.S. in mound of earth in open grass land. Thence S. 31° 11' 56"

E. 246.47 chains to a post marked U.S. in mound of earth in open grass land, which post bears from the easternmost chimney of the building used as Company Quarters at the Post, S. 7° 03' 04", E. 93.55 chains distant. Thence N. 53° 48' 04" E. 110.00 chains to the post at the point of commencement. The said boundaries containing 2770.81 acres more or less.

Camp Date Creek

Commencing at a post marked U.S. in a mound of earth and stones on the top of a spur sloping West and N. 48° 56' 30" E. 176.67 chains distant from the eastern gable of the Hospital building at the Post. Thence variation 12° 46' 30" East S. 72° 41' 30" W. 426.15 chains to a post marked U.S. in mound of earth on a spur sloping south. Thence S. 1° 16' 30" W. 132.00 chains to a post marked U.S. in mound of stones on the West side of a small ravine. Thence N. 72° 41' 30" E. 426.15 chains to a post marked U.S. in mound of stones among granite boulders and which bears from the eastern gable of the Hospital building S. 83° 40' 30" E. 132.60 chains distant. Thence N. 1° 16' 30" E. 132.00 chains to the Post at the point of commencement. The said boundaries containing 5623.90 acres more or less.

Camp McDowell — Commencing at a post marked U. S. situated on a little stony hill about 1-1/4 mile West of the River Verde. Thence variation 12° 30" East, S. 0° 45', W. 560 chains to a post marked U.S. in a dry arroyo with gentle banks. Thence S. 89° 15' E. 160.00 chains to a post marked U.S. in a small valley from which a blazed Mesquite bears S. E. 15 feet distant. Thence N. 0° 45', E. 560.00 chains to a post marked U.S. on the South bank of a small valley. Thence N. 89° 15' W. 160.00 chains to the post at the point of commencement. The said boundaries containing 8960 acres a little more or less.

Camp Grant — Commencing at a post marked U.S. in a mound of earth on a spur sloping S.W. and which post bears N. 5° 40' 30". W. 116.71 chains distant from the Flag Staff at the Post. Thence variation 12° 32' 00 East, S. 23° 28' E. 237.00 chains to a post marked U.S. in a mound of earth on top of the Mesa, and about 3 chains south of the left bank of a ravine, and which post bears from the Flag Staff at the Post S. 64° 10' E. 130.67 chains distant. Thence S. 68° 32' W. 85.78 chains to a post marked U.S. in a mound of earth on the N. W. side of a dry wash. Thence N. 23° 28' W. 237.00 chains to a post marked U.S. in a mound of earth on top of a spur sloping N.E. Thence N. 68° 32'

E. 85.78 chains to the post at the point of commencement. The said boundaries containing 2031.70 acres a little more or less.

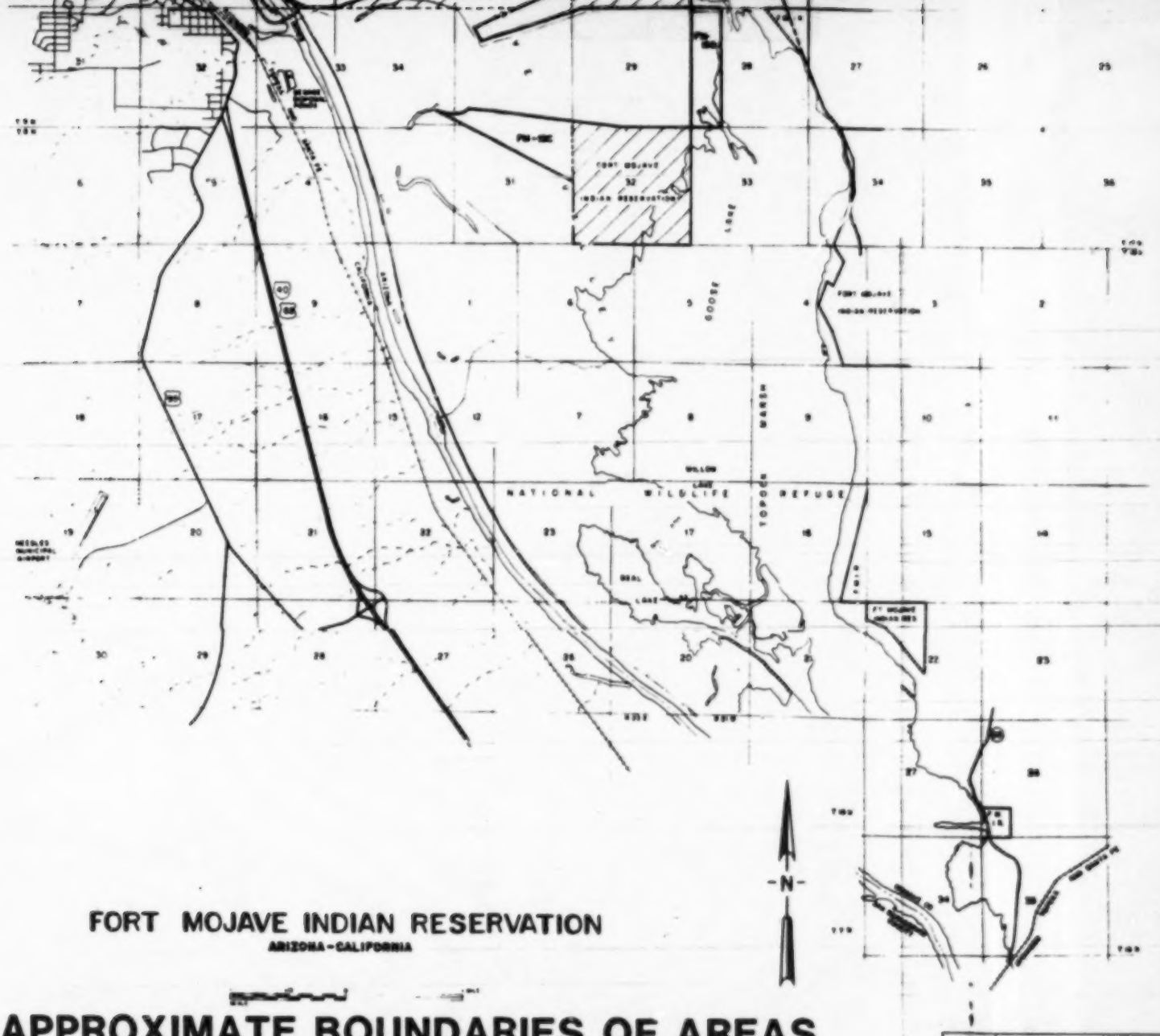
Camp Bowie — Commencing at a post marked U.S. in a mound of stones on top of a rocky spur course about N. E. and which post bears S. 80° 19' 01", E. 18.28 chains distant from the point fixed for the site of the Flag Staff at the Post. Thence variation 11° 07' 59" East, S. 64° 49' 59" W. 80.46 chains to a post marked U. S. in a mound of stones on top of a spur sloping North and which post bears S. 55° 45' 59", W. 66.28 chains distant from the point fixed for the site of the Flag Staff at the Post. Thence N. 28° 10' 01" W. 95.66 chains to a post marked U.S. in a mound of earth on a low spur sloping east and about 5 chains South from the new road to Tucson. Thence N. 64° 49' 59", E. 80.46 chains to a post marked U.S. in a mound of stones and earth on the North side of a spur sloping West and about 5 chains from the road leading through the old pass to Camp Goodwin. Thence S. 28° 10' 01" E. 95.66 chains to the post at the point of commencement. The said boundaries containing 768.83 acres a little more or less.

Camp Crittenden — Commencing at a post marked U.S. in a mound of earth on top of a spur sloping S.W. and which bears N. 69° 02' 21" E. 100.38 chains from the N. W. corner of the

Guard house at the Post. Thence variation 12° 14' 21" East, S. 34° 56' 21" W, 238.91 chains to a post marked U.S. in mound of earth on top of a low ridge course S.W. Thence N. 86° 17' 39" W. 160.50 chains to a post marked U.S. in a mound of earth on the top of a high spur. Thence N. 34° 56' 21" E. 238.91 chains to a post marked U.S. in a mound of earth on top of a spur sloping S.E. about 10 chains East of a wood road and which post bears N. 55° 08' W. 80.95 chains from the N. W. corner of the Guard House at the Post. Thence S. 86° 17' 39" E. 160.50 chains to the post at the point of commencement. The said boundaries containing 3278.08 acres more or less.

These are all the plats of posts in Arizona of which surveys have been made and at which Reservations have not yet been declared, excepting Toll Gate, and the new post proposed to be located in the Pinal Mountain Region when Camp Goodwin shall have been broken up. These last will be surveyed and the plats forwarded as soon as possible.

Camp Colorado is believed to be on an Indian Reservation, at all events it is now garrisoned by a detachment stationed at the Indian Reservation buildings for the protection of the Agents and employees, and is not needed except as an Indian Reservation.

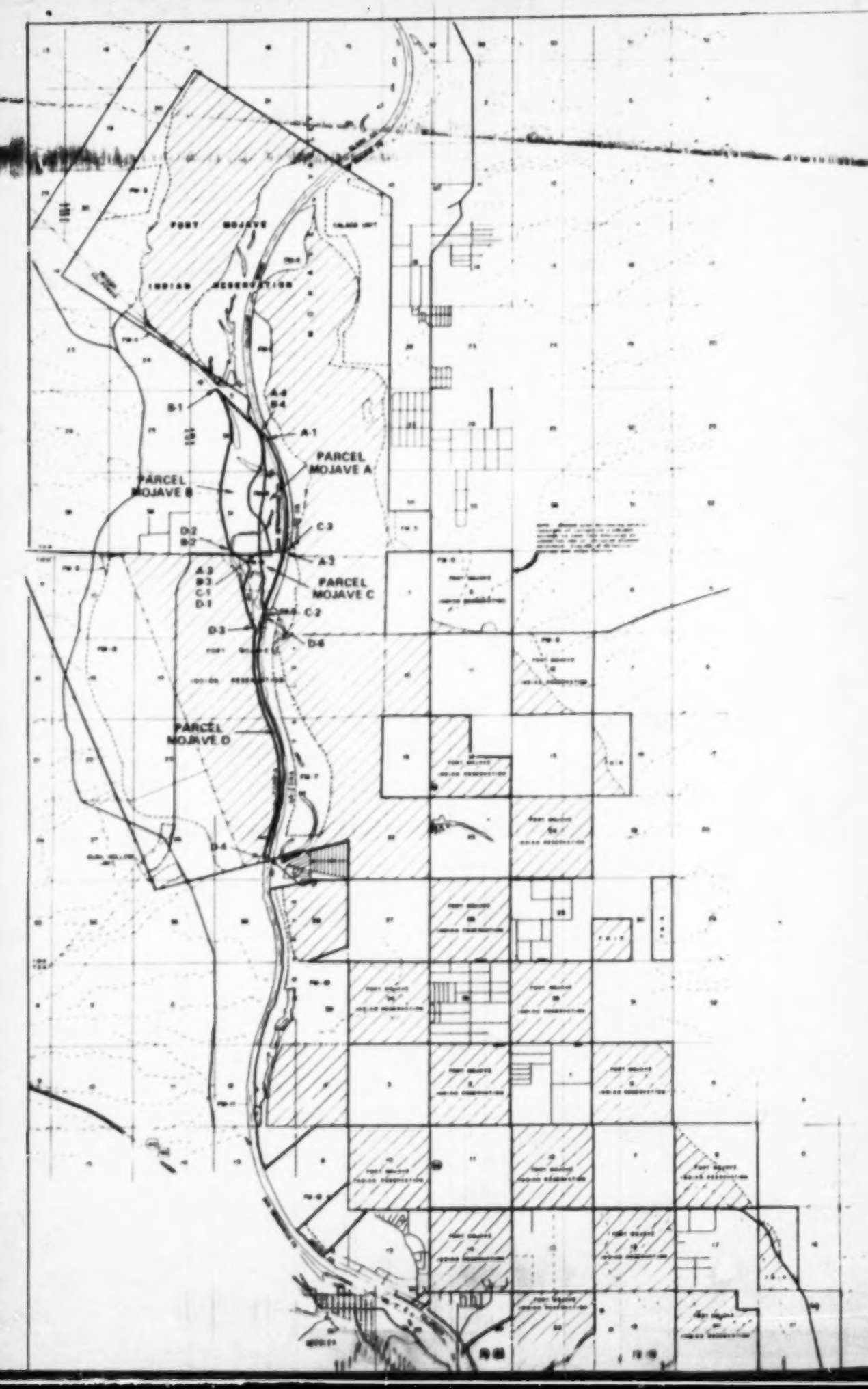


FORT MOJAVE INDIAN RESERVATION
ARIZONA-CALIFORNIA

APPROXIMATE BOUNDARIES OF AREAS TO BE EXCLUDED FROM FORT MOJAVE INDIAN RESERVATION

October 1981

EXHIBIT


FORT MOJAVE
INDIAN RESERVATION
B-1
A-4
B-4
A-1
PARCEL MOJAVE A
PARCEL MOJAVE B
D-2
B-2
C-3
A-2
A-3
B-3
C-1
D-1
PARCEL MOJAVE C
C-2
D-3
D-6
PARCEL MOJAVE D
D-4

EXECUTIVE MANSION, *May 15, 1876.*

Whereas an Executive order was issued November 16, 1874, defining the limits of the Colorado River Indian Reservation, which purported to cover, but did not, all the lands theretofore set apart by act of Congress approved March 3, 1865, and Executive order dated November 22, 1873; and whereas the order of November 16, 1874, did not revoke the order of November 22, 1873, it is hereby ordered that all lands withdrawn from sale by either of these orders are still set apart for Indian purposes; and the following are hereby declared to be the boundaries of the Colorado River Indian Reservation in Arizona and California, viz:

Beginning at a point where La Paz Arroyo enters the Colorado River, 4 miles above Ehrenberg; thence easterly with said arroyo to a point south of the crest of La Paz Mountain; thence with said mountain crest in a northerly direction to the top of Black Mountain; thence in a northwesterly direction over the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning.

U. S. GRANT.

DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Memorandum

JAN 17 1969

To: Director, Bureau of Land Management
Through: Assistant Secretary, Public Land Management

From: Secretary of the Interior

Subject: Western boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, California, through section 12, T. 5 S., R. 23 E., S.B.M., California

I have this date received a memorandum from the Solicitor regarding the proper location of the boundary of the Colorado River Indian Reservation in the subject reach. A copy of his memorandum is attached. Acting upon the conclusions expressed in the memorandum, I have determined that certain surveys of record in your Bureau should be suspended and other surveys reinstated so as to correctly show the interest of the Colorado River Indian Tribes in certain lands.

The presently monumented boundary of the reservation in the reach between Riverside Mountain and the Colorado River is shown on the plat of survey for T. 2 S., R. 23 E., S.B.M., approved November 20, 1913. I have concluded that this survey did not correctly locate the boundary line in this reach because it did not conform to the call of the Executive Order of May 15, 1876, that the boundary should be a direct line from the top of Riverside Mountain, California, toward the place of beginning to the west bank of the Colorado River. I have determined that the above-mentioned plat of survey should be suspended. The proper position of the reservation boundary should be a line from the highest point on Riverside Mountain to the meander corner common to fractional sections 25 and 36, T. 2 S., R. 23 E., S.B.M., as shown on the plat of survey of this township approved May 22, 1879, and reestablished by the dependent resurvey of the same township reflected on the plat of survey accepted July 22, 1958.

I have also determined that the proper location of the reservation boundary from section 25, T. 2 S., R. 23 E., S.B.M., through section 12, T. 5 S., R. 23 E., S.B.M., is along the meander lines shown on the plats of survey in Tps. 2, 3 and 4 S., R. 23 E., S.B.M., approved May 22, 1879, and T. 5 S., R. 23 E., S.B.M., approved December 28, 1874, all as reestablished by the dependent resurvey of these townships reflected on the plats of survey accepted July 22, 1958.

EXHIBIT 11

1961, accretion surveys of lands now lying between the aforementioned meander lines of 1874 and 1879 and the west bank of the Colorado River were undertaken in Tps. 3 and 4 S., R. 23 E., S.B.M., and T. 5 S., Rs. 23 and 24 E., S.B.M. Plats thereof were accepted on May 21, 1962. By your letter of January 27, 1964, to the State Director at Sacramento, California, you ordered that the plats of survey in Tps. 3 and 4 S., R. 23 E., S.B.M., be suspended as to the sections 36 in those townships. Thereafter, correction surveys of those sections 36 were undertaken which apportioned to them certain accretion lands. Plats of these correction surveys were accepted on October 28, 1964.

In light of the conclusion that the reservation boundary in the subject reach is along the meander lines established in 1874 and 1879, accretions to this boundary are lands of the United States held in trust for the Colorado River Indian Tribes. Thus the correction surveys, accepted October 28, 1964, apportioning accretion lands to the sections 36 are incorrect and should be suspended. Also the 1962 accretion surveys in Tps. 3 and 4 S., R. 23 E., S.B.M., should be reinstated in their entirety.

Please take such action as may be appropriate to reflect the conclusions herein stated, including suspension and reinstatement of plats. Also please note the official records accordingly so that henceforth such records will indicate the proper location of the boundary of the Colorado River Indian Reservation in the subject area.

(sgd) Stewart L. Udall

Attachment

Secretary's Files
Solicitor's Files
Secretary's Reading Files (2)
Commissioner of Indian Affairs (2)
Regional Solicitor, Los Angeles (2)
Assistant Solicitor, ILA
Mrs. Ellengoben, ILA
Associate Solicitor, IA

MHB:alisfqmmah:1/16/69

EXHIBIT 11

IN REPLY REFER T

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

90-1-5-C69(4154

Memorandum

JAN 17 1969

To: Secretary of the Interior

From: Solicitor

Subject: Western boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, California, through section 12, T. 5 S., R. 23 E., S.B.M., California

This is in response to your request that we review and define the location of the western boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, California, to its intersection with the line between the second and third tiers of sections in T. 5 S., R. 23 E., S.B.M., California (hereinafter referred to as from the top of Riverside Mountain through section 12, T. 5 S., R. 23 E., S.B.M., California).

The Colorado River Indian Reservation was established by the Act of March 3, 1865, 13 Stat. 541, 559. Subsequently, its boundaries were modified by the Executive Orders of November 22, 1873, November 16, 1874, May 15, 1876, and November 22, 1915. The unallotted lands of the reservation are held by the United States in trust for the Colorado River Indian Tribes. Act of April 30, 1964, 78 Stat. 188.

The Colorado River Indian Tribes have requested that the western boundary of the reservation be finally determined. Until such determination is made the leasing provisions of the Act of April 30, 1964, supra, do not extend to lands south of section 25, T. 2 S., R. 23 E., S.B.M., California.

The Executive Order which describes the portion of the boundary considered in this memorandum is as follows:

EXECUTIVE MANSION, May 15, 1876.

Whereas an Executive Order was issued November 16, 1874, defining the limits of the Colorado River Indian Reservation, which purported to cover, but did not, all the lands theretofore set apart by act of Congress approved March 3,

EXHIBIT 12

1865, and Executive Order dated November 22, 1873; and whereas the order of November 16, 1874, did not revoke the order of November 22, 1873, it is hereby ordered that all lands withdrawn from sale by either of these orders are still set apart for Indian purposes; and the following are hereby declared to be the boundaries of the Colorado River Indian Reservation in Arizona and California, viz:

Beginning at a point where La Paz Arroyo enters the Colorado River, 4 miles above Ehrenberg; thence easterly with said arroyo to a point south of the crest of La Paz Mountain; thence with said mountain crest in a northerly direction to the top of Black Mountain; thence in a northwesterly direction over the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning.

U. S. Grant

This opinion deals only with that portion of the above-described boundary from the top of Riverside Mountain through section 12, T. 5 S., R. 23 E., S.B.M., California.

As established by the Act of March 3, 1865, supra, and enlarged by the Executive Order of November 22, 1873, the Colorado River Indian Reservation was located in the Territory of Arizona and bounded on the west by the Colorado River. Lands in California were first added to the reservation by the Executive Order of November 16, 1874. The record discloses that this latter Executive Order enlarging the reservation was designed to make possible control of access to the reservation from the west and to avoid loss (transfer of land) caused by changes in the channel of the Colorado River. That segment of the west boundary of the reservation germane to this memorandum, i.e., from the top of Riverside Mountain to the west bank of the Colorado River, was described in the Executive Order of November 16, 1874, as a line " * * * [from the top of Riverside Mountain] in a Southeasterly direction to the point of beginning * * * ."

When this segment of the boundary was surveyed in 1875 by Chandler Robbins, it was ascertained that this line severed a large tract of valuable land on the east side of the river which had been reserved

EXHIBIT 12

for Indian use by the Act of March 3, 1865, supra, and the Executive Order of November 22, 1873. Because of this fact, the Indian Agent in charge of the reservation, by letter of January 31, 1876, requested the Commissioner of Indian Affairs to obtain an Executive Order changing the boundary line of the reservation between Riverside Mountain and the place of beginning, making the Colorado River the boundary line. Thereafter, by letter of May 10, 1876, from the Acting Commissioner to the Secretary of the Interior, it was recommended that the President be requested to issue an order changing this boundary line so that when it reached the west bank of the Colorado River it would follow said west bank down the river to a point opposite the point of beginning, thence to the place of beginning. Following a concurrence in the recommendation of the Commissioner of Indian Affairs by the Acting Secretary, the President issued the Executive Order of May 15, 1876. For many years the proper location of the west boundary of the reservation, as described in the Executive Order of May 15, 1876, has been in dispute.

During the trial of Arizona v. California, et al., the United States claimed water rights for an extensive area of irrigable lands along the west side of the river. California resisted the claim of the United States for any lands south of section 25, T. 2 S., R. 23 E., on the grounds that there were no such lands within the boundary of the reservation. California's contention was based upon the fact that the west bank of the river, which was the call of the west boundary of the reservation in the Executive Order of May 15, 1876, established a boundary that would change with movements of the river. The United States contended, among other things, that this Executive Order established a permanent and unchanging boundary along the west bank of the river as it existed in 1876.

The Special Master ordered that the proper position of the boundary be litigated and, following trial, the Special Master made Findings of Fact and Conclusions of Law which, in effect, held that the Executive Order of May 15, 1876, established a boundary which changes as the course of the Colorado River changes, except when such changes are due to an avulsion. He further held that two avulsive changes had severed lands from the reservation and placed these lands on the west side of the river. The effect of the Master's holding was to disallow any claim of the United States for water for lands south of section 25, T. 2 S., R. 23 E., which were located on the west side of the Colorado River except in the two areas the Master found to have been severed from the reservation and placed on the west side of the river by manmade avulsive changes in the river's course.

Before the Supreme Court, California excepted to the Findings of Fact and Conclusions of Law of the Special Master. In ruling thereon, the Supreme Court disagreed with the Special Master's decision to

determine the disputed boundary of the Colorado River Indian Reservation. Arizona v. California, et al., 373 U.S. 546, 601 (1963). The effect of the Supreme Court's decision was to leave the boundary question open for future determination.

Location of the Boundary Between Riverside Mountain and the West Bank of the Colorado River

The proper position of the first segment of the boundary from the top of Riverside Mountain to the west bank of the river presents little difficulty. The first question that arises is which of two peaks on Riverside Mountain is the top. Absent specific definition in the Executive Orders of November 16, 1874, and May 15, 1876, it is believed that the term "top of Riverside Mountain" should be given its commonly accepted meaning and, therefore, means the highest point of that mountain.

The "top of Riverside Mountain" was supposedly monumented during a survey in 1912 by R. A. Farmer; however, there is evidence that this corner was not placed on the highest point of the mountain and, therefore, does not represent the true corner of the reservation boundary. In these circumstances, the language of the Executive Orders of November 16, 1874, and May 15, 1876, must control and the erroneous Farmer survey should be suspended in the reach from Riverside Mountain to the Colorado River for reasons hereinafter stated.

It is concluded that the reservation boundary in this reach should follow a line from the highest point on Riverside Mountain on a direct bearing toward the place of beginning as described in the Executive Order of May 15, 1876, until it strikes the proper location of the west bank of the river as it existed in 1876. This line should terminate at the point it intersects the west bank. The Executive Order clearly stated the line should go to the west bank, not halfway down the bank, to the water's edge, or any other place. The bank of a river is the water-washed and relatively permanent elevation or acclivity at the outer line of the riverbed which separates the bed from the adjacent upland, whether hill or valley, and serves to confine the waters when they reach and wash the bank without overflowing it. Oklahoma v. Texas, 260 U.S. 606 (1923). It is, therefore, concluded that the call to the west bank must be taken to mean the line of ordinary high water as it existed in 1876.

In determining the location of a boundary, when the United States has not conveyed its title to the abutting lands, it may survey and resurvey what it owns and establish and reestablish boundaries. United States v.

State Investment Co., 264 U.S. 206 (1924). The record discloses that all the lands outside the reservation boundary in this reach are owned by the United States and are under the jurisdiction of the Department of the Interior. The lands inside the boundary are owned by the United States in trust for the Colorado River Indian Tribes. No private ownerships are involved. In 1879, W. F. Benson established a meander corner common to sections 25 and 36, T. 2 S., R. 23 E., S.B.M., at a point on the west bank of the Colorado River which also fell on the line between the highest point on Riverside Mountain and the place of beginning. In these circumstances, as a matter of administrative convenience, it may be determined that the reservation boundary can and should be reestablished as a line between the highest point of Riverside Mountain and the meander corner common to the aforesaid sections 25 and 36. This line is sustained by adequate evidence of the proper location of the boundary as described in the Executive Order of May 15, 1876.

Location of the Boundary from Section 25, T. 2 S., R. 23 E., through Section 12, T. 5 S., R. 23 E., S.B.M.

From the point where the line from Riverside Mountain intersects the bank of the river, as described above, the second segment of the boundary should follow downstream along the bank of the river at the line of ordinary high water as it existed at the time of the issuance of the Executive Order of May 15, 1876, to the south boundary of section 12, T. 5 S., R. 23 E., S.B.M., subject to the application of the doctrine of erosion and accretion and avulsion to any intervening changes. Oklahoma v. Texas, supra.

With regard to such intervening changes, when the banks of a river change gradually and imperceptibly, the process is called erosion and accretion and a riparian owner's boundary will remain the same. In cases where a river suddenly abandons its old bed and seeks a new course, the change is termed an avulsion and a riparian owner's boundary will become fixed and permanent along the line of the former channel. Nebraska v. Iowa, 143 U.S. 359 (1892).

The Executive Order of May 15, 1876, which included lands located east of the west bank of the river, would operate as to all those lands not previously disposed of by the United States, as unquestionably the President had the power to reserve the lands by Executive Order. Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942); United States v. Midwest Oil Co., 236 U.S. 459 (1915). A portion of the west half of the riverbed, however, was owned at that time by the State of California because the Colorado River has been held to be a navigable stream in the reach here under consideration. Arizona v. California, et al.,

283 U.S. 423 (1931). The soil beneath navigable waters was not granted by the original states under the Constitution to the United States but was reserved to the States. Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845). Upon the admission of a new State into the Union on an equal footing it acquires all the rights of the original States which, it has been held, includes title to the lands underlying navigable waters. Mumford v. Wardwell, 73 U.S. (6 Wall.) 423 (1867). The extent of the ownership acquired by the States upon admission is the soil below ordinary high-water mark. Mobile Transp. Co. v. City of Mobile, 187 U.S. 479 (1903). Thereafter, where a navigable stream is a boundary a riparian owner's title will extend to low or high-water mark or to the center of the stream according to the law of the State in which it is situated. Packer v. Bird, 137 U.S. 661 (1891). The United States like any other riparian owner takes such title to submerged lands as may be conferred by State action. Donnelly v. United States, 228 U.S. 243 (1913).

In 1873, California enacted a law, now codified as Civil Code § 830, which had the effect of granting to riparian owners on nontidal navigable waters ownership of the soil to low-water mark. It therefore follows that in those areas where the United States owned the uplands, it gained title under State law to the low-water mark. 43 Cal. Ops. Atty. Gen. 291 (1964); Crews v. Johnson, 21 Cal. Rptr. 37 (1962). It is concluded, therefore, that at the time of issuance of the Executive Order of May 15, 1876, the United States owned the area between ordinary high-water mark and low-water mark except in those areas where it may have previously disposed of lands abutting the ordinary high-water mark. The record discloses, however, that in 1876 the United States owned all the lands abutting the west bank of the Colorado River from the above-mentioned section 25, T. 2 S., R. 23 E., south through section 12, T. 5 S., R. 23 E.

In issuing the Executive Order of May 15, 1876, the United States effectively severed that portion of the lands between the high and low-water marks by including them in the reservation, thus, effectively segregating these lands from public lands lying to the west thereof. It must be concluded that the Executive Order was effective to reserve any lands within the river then owned by the United States as such order clearly intended that the river be included in the reservation.

Thereafter, accretions forming against this shoreline to the east thereof would be lands held in trust for the Colorado River Indian Tribes in those areas where the river has moved to the east by the normal process of erosion and accretion. Similarly, in those areas where the river has moved to the west by the normal process of

erosion and accretion, any accretions forming on the east side of the river are owned by the United States in trust for the Colorado River Indian Tribes.

In possible conflict with the reservation boundary, as hereinabove set out, are three tracts of school lands, these being sections 36 in Tps. 2, 3, and 4 S., R. 23 E. While the Act of Congress which granted California its school lands was passed in 1853, 10 Stat. 244, 246, title to such lands does not pass until they are surveyed. United States v. Morrison, 240 U.S. 192 (1916). Moreover, title to the school lands thus granted was expressly subject to reservations created prior to survey. 10 Stat. 244, 246. These three sections 36 were surveyed in 1879. All three were fractional sections abutting the meander line run as part of the survey.

It is the general rule that a meander line is not a line of boundary but one used to delineate the sinuosity of the bank or shore as a means of ascertaining the quantity of land in a fractional lot, the boundary line being the water itself. St. Paul and Pacific R. Co. v. Schurmeier, 74 U.S. (7 Wall.) 272 (1869). Thus, the Department has held on numerous occasions that grants by the United States of lands shown on plats of survey as adjoining navigable waters are not limited to the meander line but extend to the water line. Harvey M. La Follette, 26 L.D. 453 (1898). John J. Serry, 27 L.D. 330 (1898). Gleason v. Pent, 14 L.D. 375 (1892). Louis W. Pierce, 18 L.D. 328 (1894). While this rule has been applied in cases involving the issuance of a patent, the certification of lands (such as school lands) is equivalent to patent and divests the Department of all jurisdiction over the lands or title thereto. Frasher v. O'Connor, 115 U.S. 102 (1885). Smith v. Portage Lake and Superior Ship Canal Co., 11 L.D. 475 (1890). State of California v. Moody, 9 L.D. 635 (1889).

Against this background, it can be expected that the State or its successors in interest might claim title to accretions to these three school sections. However, as above noted, title to these lands was expressly subject to reservations created prior to the survey thereof. Inasmuch as the Executive Order of May 15, 1876, effectively segregated the shoreline from these fractional sections 36 by including it in the reservation, it is concluded that accretions to this shoreline are lands held in trust for the Colorado River Indian Tribes and that they did not attach to the three fractional sections 36 as surveyed in 1879. For these reasons, correction surveys approved in 1964 which apportioned accretion lands to sections 36, Tps. 3 and 4 S., R. 23 E., should be suspended and the accretion surveys of these townships approved in 1962 should be reinstated in their entirety.

There are also three parcels of School Indemnity Lands in sections 1 and 12, T. 5 S., R. 23 E., selection of which was approved in 1926. All three parcels abutted the meander line as surveyed by O. P. Calloway in 1874. Congress had previously authorized Lieu Selections in California. 14 Stat. 218, 220. However, such Lieu Selections are limited to other lands of equal acreage. 26 Stat. 796. It may also be anticipated that the State or its successors in interest would claim accretions to these Indemnity parcels. The record discloses that, at the time California made its selection of these fractional lots, substantial accretions had previously formed between the meander line abutting these parcels and the course of the river. Since California was in any event limited to lands of equal acreage in making its Lieu Selections, it cannot be said that approval of these School Indemnity Lands carried accretions which had previously formed. To hold otherwise would mean that California acquired lands in excess of that which was permitted by law. This then, is an additional reason why the accretions would not have passed with title to the fractional lots. Of course, the rationale with regard to accretions to the school sections hereinabove discussed is equally applicable to the School Indemnity Lands in that the inclusion of the shoreline in the reservation prior to disposal of the fractional lots effectively segregated such shoreline from the abutting lands which the State eventually selected.

As mentioned above, the proper location of the boundary in the reach from section 25, T. 2 S., R. 23 E., through section 12, T. 5 S., R. 23 E., is the line of ordinary high water along the west bank of the river at the time of issuance of the Executive Order of May 15, 1876, subject to application of the doctrine of erosion and accretion and avulsion. Absolute certainty as to the location of the bank in 1876 is probably not possible to achieve. However, in fixing the boundary, all that is required is such certainty as is reasonable as a practical matter, having regard to the circumstances. Arkansas v. Tennessee, 269 U.S. 152 (1925). The record discloses that the reach of the bank of the river from section 25, T. 2 S., R. 23 E., through T. 4 S., R. 23 E., was meandered in 1879 and that portion of the right bank in sections 1 and 12, T. 5 S., R. 23 E., was meandered in 1874. These meander lines were reestablished in a dependent resurvey made by the Bureau of Land Management in 1958.

As noted above, in 1876 the United States owned all the lands abutting the river on the west from the above-mentioned section 25, T. 2 S., R. 23 E., south through section 12, T. 5 S., R. 23 E. Also, the record indicates the present course of the river in this reach is now along or east of its position as surveyed in 1874 and 1879, except in two insignificant respects. The record also discloses that the lands presently lying between the meander lines of 1874 and 1879 and

the right bank of the river were formed by accretion. Since the bulk of the lands abutting these meander lines on the west are presently owned by the United States and those lands in non-federal ownership located to the west of the meander lines are not entitled to accretions as against the United States in any event, these meander lines may be adopted as the boundary of the reservation as a matter of administrative convenience. Only lands of the United States under the jurisdiction of the Department of the Interior are involved. Considering the nature of surveys in isolated areas and the limits of accuracy which could be achieved with equipment available nearly 100 years ago, it is concluded that these lines are adequate evidence of the proper location of the reservation boundary as they are reasonable as a practical matter, having regard to the circumstances. Arkansas v. Tennessee, supra.

In summary, it is concluded that in those areas where the United States has not conveyed its title to the lands abutting the reservation, it may survey and resurvey what it owns and establish and reestablish boundaries. United States v. State Investment Co., supra. The United States may make or correct its surveys and such are not assailable in the courts, except in a direct proceeding. Cragin v. Powell, 128 U.S. 691 (1888). Therefore, in the above-mentioned areas, it is concluded the determination of the reservation boundary as herein made is not subject to collateral attack. As to those areas where the lands abutting the reservation boundary are in non-federal ownership, it may be expected that litigation will be necessary to extinguish claims of others which are adverse to those of the Colorado River Indian Tribes.

cc:
Commissioner of Indian Affairs (2)
Regional Solicitor, Los Angeles
Director, Bureau of Land Management (2) (detached)

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; I am employed in the office of a member of the bar of this Court at whose direction the service was made; my business address is 1111 Sunset Boulevard, Los Angeles, California 90012.

On November 4, 1981, I served the within

FIRST AMENDED COMPLAINT FOR REVIEW OF ADMINISTRATIVE ACTION, FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

on the interested parties in said action by placing two true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Patrick Barry
Department of Justice
Room 1748
Indian Resources Section
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Stephen V. Petix
Asst. U.S. Attorney
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 4, 1981, at Los Angeles, California.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California and the COACHELLA VALLEY WATER DISTRICT, a public agency of the State of California, Plaintiffs, v. THE UNITED STATES OF AMERICA, JAMES WATT, as Secretary, United States Department of the Interior, Defendants.	CIV. ACTION NO. 81-0678-GT(M) PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; I am employed in the office

of a member of the bar of this Court at whose direction the service was made; my business address is 1111 Sunset Boulevard, Los Angeles, California 90012.

On November 5, 1981, I served the within

FIRST AMENDED COMPLAINT FOR REVIEW OF ADMINISTRATIVE ACTION, FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California and the COACHELLA VALLEY WATER DISTRICT, a public agency of the State of California Plaintiffs, v. THE UNITED STATES OF AMERICA, JAMES WATT, as Secretary, United States Department of the Interior. Defendants.	CIVIL NO. 81-0678-GT(M) UNITED STATES' MOTION TO DISMISS

Defendants, the United States of America and the Secretary of the Interior, by and through their undersigned attorneys, respectfully move this Court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss Plaintiffs' Amended Complaint for the reasons set forth in the attached Memorandum in Support.

Respectfully submitted this 19th day of February, 1982.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California and the COACHELLA VALLEY WATER DISTRICT, a public agency of the State of California Plaintiffs, v. THE UNITED STATES OF AMERICA, JAMES WATT, as Secretary, United States Department of the Interior. Defendants.	CIVIL NO. 81-0678-GT(M) MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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12-8-76 DOJ

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 3

III. PLAINTIFFS ARE NOT ENTITLED TO JUDICIAL REVIEW OF THE RESERVATION BOUNDARIES 7

A. Plaintiffs Lack Standing to Litigate the Issue of Inclusion of the Disputed Lands in the Indian Reservations 9

B. Plaintiffs Are Not Entitled to Judicial Review Under the APA 11

IV. THE SOVEREIGN IMMUNITY OF THE UNITED STATES BARS THIS LAWSUIT 14

V. THE FAILURE TO JOIN ARIZONA AND CALIFORNIA REQUIRES DISMISSAL OF PLAINTIFFS' SECOND, FOURTH, AND SIXTH CLAIMS FOR RELIEF 19

A. The States of California and Arizona Are Necessary Parties 19

B. The States of California and Arizona Are Not Feasible Parties 21

C. The States of California and Arizona Are Indispensable to this Action and Therefore Plaintiffs' Amended Complaint Should be Dismissed 23

1. To What Extent a Judgment Rendered in the Person's Absence be Prejudicial to Him or Those Already Parties 23

2. The Extent to Which by Protective Provisions in the Judgment, by the Shaping of Relief or other Measures, the Prejudice can be Lessened or Avoided 24

3. Whether a Judgment Rendered in the Person's Absence Will Be Adequate 24

4. Whether the Plaintiff Will Have An Adequate Remedy if the Action is Dismissed for Non-Joinder 25

VI. PLAINTIFFS' ACTION FOR REVIEW OF THE SECRETARY'S ORDERS FOR THE COLORADO RIVER AND THE FT. MOJAVE INDIAN RESERVATIONS ARE BARRED BY THE STATUTE OF LIMITATIONS 25

rm OBD-183
8-76 DOJ

CITATIONS

Cases:

Arizona v. California, No. 8 Original, United States Supreme Court..... 2

Arizona v. California, 373 U.S. 546 (1963)..... 2

Arizona v. California, 376 U.S. 340 (1964)..... 2, 4, 5

Arizona v. California, 439 U.S. 419 (1979)..... 5, 6

Arizona v. California, 440 U.S. 942 (1979)..... 6

Bowker v. Morton, 541 F.2d 1347 (9th Cir. 1976)..... 13

Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965)..... 11

California v. Arizona, 440 U.S. 59 (1979)..... 22

City of Fresno v. California, 372 U.S. 627 (1963)... 15

Cragin v. Powell, 128 U.S. 691 (1888)..... 10, 11

Crown Coat Front Co. v. United States, 386 U.S. 503 (1976)..... 27

D.B. Ford, Inc. v. United States, 280 F.Supp. 1202 (D. Minn. 1974)..... 27

Dugan v. Rank, 372 U.S. 609 (1963)..... 15

Eldemann v. Jordan, 415 U.S. 651 (1974)..... 22

Hawaii v. Gordon, 373 U.S. 57 (1963)..... 15

Illinois v. City of Milwaukee, 406 U.S. 91 (1972)... 22

Johanson v. Washington, 190 U.S. 179 (1903)..... 9

Knight v. United States Land Association, 142 U.S. 161 (1891)..... 9

Lane v. Darlington, 249 U.S. 331 (1919)..... 9

Larson v. Domestic & Foreign Commerce Corporation, 337 U.S. 682 (1949)..... 15, 16, 17, 18, 19

Malone v. Boudin, 369 U.S. 643 (1962)..... 15, 16

Morris v. United States, 521 F.2d 872 (9th Cir. 1975)..... 15

Oppenheim v. Campbell, 571 F.2d 660 (D.C. Cir. 1978) 27

rm CBD-183
2-8-76 DOJ

Reese v. Skelly Oil Co., 53 F.R.D. 548 (S.D. Miss. 1971)..... 23, 24

Schutten v. Shell Oil Company, 421 F.2d 869 (5th Cir. 1970)..... 20

Starbuck v. City and County of San Francisco, 556 F.2d 450 (th Cir. 1977)..... 12, 14

State of Washington v. Udall, 417 F.2d 1310 (9th Cir. 1969)..... 16

United States v. Reimann, 504 F.2d 135 (10th Cir. 1974)..... 9

United States v. Sherwood, 312 U.S. 584 (1941)..... 15

United States v. State Investment Co., 264 U.S. 206 (1924)..... 9, 11

Valley Forge Christian College v. Americans United For Separation of Church and State, 50 U.S.L.W. 4103 (January 12, 1982)..... 10

Statutes:

13 Stat. 541..... 7

13 Stat. 559..... 7

Treatises:

Wright & Miller, Federal Practice and Procedure, 1608..... 23

Wright & Miller, Federal Practice and Procedure, 1621..... 21

Miscellaneous:

United States Code

Administrative Procedure Act:

5 U.S.C. 1, et. seq.

5 U.S.C. 701-706..... 2, 8

5 U.S.C. 702..... 14, 19

25 U.S.C. 176..... 8

28 U.S.C. 1251(a)..... 22

orm OBD-183
2-8-76 DOJ

28 U.S.C. 1331..... 8
28 U.S.C. 2321-2325..... 28
28 U.S.C. 2401..... 26, 27
28 U.S.C. 2409 a 9, 15, 23
43 U.S.C. 751..... 8
43 U.S.C. 752..... 8
43 U.S.C. 772..... 8
Federal Rules of Civil Procedure:
28 U.S.C.
Rule 19..... 20, 21, 23, 25
Rule 19(b)..... 23

Form OBD-183
12-8-76 DOJ

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California and the COACHELLA VALLEY WATER DISTRICT, a public agency of the State of California Plaintiffs, v. THE UNITED STATES OF AMERICA, JAMES WATT, as Secretary, United States Department of the Interior. Defendants.	CIVIL NO. 81-0678-GT(M) MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I

INTRODUCTION

Plaintiffs Metropolitan Water District (hereinafter M.W.D. or Metropolitan) and Coachella Valley Water District (hereinafter Coachella) have instituted this litigation to challenge the inclusion of certain lands within the boundaries of the Ft. Yuma,[1/]

1/ The Ft. Yuma Reservation is inhabited by the Quechan Tribe and is frequently referred to as the Quechan Reservation.

Form OBD-183
12-8-76 DOJ

Ft. Mojave and Colorado River Indian Reservations. Neither plaintiff claims any interest in the land alleged to be wrongfully included within the reservation boundaries. Instead, plaintiffs assert that if portions of such lands are found to be entitled to reserved water rights in the ongoing proceedings in Arizona v. California, No. 8 Original, U.S. Supreme Court, and those rights are actually put to use, and if California users are ultimately restricted to 4.4 million acre-feet of water from the Colorado River, less water may be available to satisfy plaintiffs' rights.

As plaintiffs appear to recognize, on these reservations only those lands held in trust for the use of the Indian inhabitants are entitled to reserved water rights. See Arizona v. California, 373 U.S. 546 (1963), 376 U.S. 340, at 345 (1964). Thus, the crucial issue relative to the challenged boundaries is the subsequent treatment of the land within those boundaries as trust land.[2/] But plaintiffs claim no interest whatsoever in the affected lands. Accordingly, plaintiffs lack standing to invoke the jurisdiction of this Court to challenge the reservation boundaries. Nor can they look to the Administrative Procedure Act, 5 U.S.C. 701-706 for relief for they have suffered no legal wrong and are not "adversely affected or aggrieved by agency action within the meaning of a relevant statute" 5 U.S.C. 702. Moreover, the United States has not otherwise waived its sovereign immunity in connection with actions such as this. At any rate, the plaintiffs have not joined

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2/ Not all land within the newly recognized boundaries is considered to be in "trust status". See, e.g., Secretarial Orders of December 20, 1978, Exhibit 2 to the Amended Complaint.

Form CBD-183
2-8-76 DOJ

the States of California and Arizona, both of which are indispensable parties to this action. Finally, in connection with the Secretarial orders affecting the Ft. Mojave and Colorado River boundary, the statute of limitations has run. These faults warrant dismissal of this action.

II

STATEMENT OF CASE

Metropolitan and Coachella filed their Complaint on July 21, 1981, and an Amended Complaint was filed in November, 1981. The Amended Complaint attacks three decisions issued by the Secretary of the Interior[3/] determining the boundaries to the Quechan, Ft. Mojave, and the Colorado Indian Reservations (hereinafter, when referred to collectively, "the Indian reservations").[4/] In addition to disputing the expansion of the boundaries, plaintiffs allege that the United States' claims of ownership of certain lands within those boundaries, including portions of the bed of the Colorado River, are incorrect. Plaintiffs request the Court (1) to order a revocation of the three Secretarial orders determining the boundaries of the three reservations, (2) to establish the boundaries as plaintiffs claim is correct, and finally (3) to

---

3/ Copies of the Secretarial orders and opinions by the Solicitor, in support thereof, setting the boundaries for the Quechan, Ft. Mojave, and Colorado River Indian Reservations, are attached as Exhibits 2, 7, and 11 to Plaintiffs' Amended Complaint.

4/ The three decisions (Quechan, 1978; Ft. Mojave, 1974; and Colorado River, 1969), in essence found that earlier decisions setting the boundaries for the three Indian reservations were in error and declared that new boundaries should be set.

Form CBD-183
2-8-76 DOJ

prohibit the use of Colorado River water on those lands found to be outside of the previously recognized boundaries of the reservations.[5/]

Plaintiffs' interest in these boundary determinations is remote. Nowhere in their Complaint do they allege an interest in the lands asserted to have been erroneously included within the three reservations. Indeed, they claim that the ownership of a substantial portion of the area allegedly erroneously treated as reservation lands is with the States of Arizona and California, neither of which is a party to this litigation. Instead of asserting an interest in the affected lands, M.W.D. and Coachella assert merely that the determination of the boundaries may ultimately affect the amount of water available to satisfy their water rights.

At present, M.W.D. holds the fourth and fifth priority to waters available to use in California pursuant to the decree in Arizona v. California, 376 U.S. 340 (1964).[6/] The priorities of certain California diverters were set by the Secretary of the Interior in the 1931 General Criteria and in the contracts executed with each of the diverters. Under the fourth priority Metropolitan

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5/ We assume plaintiffs merely seek to have the affected Indian tribes foreclosed from using water on such land and not to foreclose the use of any Colorado River water on these lands.

6/ The Supreme Court in dividing the waters of the lower Colorado River between Arizona, Nevada and California, limited California's appropriation to 4,400,000 acre-feet of water per year. In addition, under certain conditions, California is entitled to 1/2 of any surplus. See Arizona v. California, supra, 376 U.S. at 342.

Form OBD-183
12-8-76 DOJ

is entitled to 550,000 acre-feet of water per year for use on the coastal plain of Southern California. The fifth priority entitles Metropolitan to 662,000 acre-feet of water, also for use on the coastal plain of Southern California. Metropolitan alleges that when California is restricted to 4.4 million acre-feet of water per year, it will only be entitled to divert 550,000 acre-feet per year. See Amended Complaint, paragraph 23.

Coachella is entitled to receive water under the third priority. Pursuant to an agreement of compromise dated February 14, 1934, Coachella conceded the Imperial Irrigation District a priority to the third priority. See Amended Complaint, paragraph 24.

The United States also holds water rights from the Colorado River in trust for the Quechan, Ft. Mojave and Colorado River Indian Tribes. See Arizona v. California, 373 U.S. 546, 595-601 (1963); 376 U.S. 340, 343-346 (1964); 439 U.S. 419, 423, 428, 436 (1979). Such rights are senior to virtually all other rights on the Colorado River including those held by Coachella and M.W.D. In December, 1978 the United States filed a motion in the Supreme Court to modify the 1964 decree to increase the allocation of water available for use on the five Indian reservations along the lower Colorado River. The motion seeks additional water for lands within the areas previously recognized as part of the reservation but for which no water was claimed in the earlier proceedings. The second portion of the United States' claim is for lands once treated as outside of the reservation boundaries but now determined to be within their true boundaries. The affected Tribes had previously

Form OBD-183
12-8-76 DOJ

sought to intervene to assert similar claims and those motions, as well as the United States' motion, were referred to a Special Master. Arizona v. California, 439 U.S. 419, 436-37 (1979); 440 U.S. 942 (1979). The issues have been submitted to the Master and his report is due shortly.

At present it is uncertain whether the Master, let alone the Supreme Court, will grant additional water rights to the United States for use on lands within the areas disputed as part of the reservations here.

The plaintiffs are challenging the boundaries of Ft. Yuma, Ft. Mojave, and Colorado River Reservations.

The Ft. Yuma Reservation was created by Executive Order on January 9, 1894, I Kappler, Indian Affairs, Laws and Treaties p. 832. On December 20, 1978, the Solicitor of the Department of the Interior issued an opinion on the boundaries of this reservation. See Exhibit 3 to the Amended Complaint. His view differed from two previous opinions. On December 20, 1978, the Secretary of the Interior issued an order consistent with the Solicitor's opinion. That order expressly noted the continuing viability of third party interests within the external boundaries of the reservation. In 1981 the Secretary issued another order which recognized all such interests within the reservation. A survey of the boundaries was also ordered. The plat was entered on February 20, 1980, and on January 20, 1981.

The Camp Mojave Military and Hay and Wood Reserve was created by an Executive Order on March 30, 1870. General Order

Form OBD-183
12-8-76 DOJ

No. 19 of the War Department, dated August 4, 1870, defined its boundaries. An Executive Order dated September 19, 1880, transferred the Ft. Mojave Military Reservation and Hay and Wood Reserve to the Department of the Interior for use by the Ft. Mojave Indians. On June 3, 1974, the Secretary of the Interior determined that an earlier survey was erroneous. Exhibit 7 to the Amended Complaint. The Secretary's order was supported by a Solicitor's opinion.

The Colorado River Reservation was established by Act of March 3, 1865. 13 Stat. 541, 559. It was enlarged by Executive Order of November 22, 1873, and again by Executive Order of November 16, 1874. The November 16, 1874, order enlarged the reservation to include lands on the west side of the Colorado River in the State of California. Then, by Executive Order dated May 15, 1876, the western boundary of the reservation was determined to be the west bank of the Colorado River.

On January 17, 1969, the Secretary of the Interior determined that the correct western boundary of the reservation was a fixed boundary dependent upon the 1874 and 1879 meander lines as shown on the plats of survey approved December 28, 1874 and May 22, 1879. The Secretary's decision was supported by a Solicitor's opinion of the same date.

III

PLAINTIFFS ARE NOT ENTITLED TO JUDICIAL REVIEW OF THE RESERVATION BOUNDARIES

Plaintiffs' Amended Complaint challenges the Secretary's orders to resurvey the boundaries of the Quechan, Ft. Mojave and

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12-8-76 DOJ

Colorado River Indian Reservations. Plaintiffs allege that the Secretary has unlawfully included as part of the three reservations, lands which the United States does not hold in trust for the benefit of the Indian inhabitants. The plaintiffs further allege that included within these lands are portions of the historic bed of the Colorado River and that those portions are owned by the States of California and Arizona. Jurisdiction to attack the disputed Secretarial actions is claimed under 28 U.S.C. 1331 and the Administrative Procedure Act, 5 U.S.C. 701-706 (APA). Plaintiffs' challenge, however, fails for lack of standing. Similarly the APA provides no basis for judicial review of the disputed actions.

We turn first to the statutes establishing the Secretary's authority to define the boundaries of the Quechan, Ft. Mojave and Colorado River Reservations. That authority is found in 25 U.S.C. 176 which declares that surveys of Indian reservations shall be under the "jurisdiction and control of the Bureau of Land Management and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed". 43 U.S.C. 751 and 752 establish general rules for the conduct of surveys. 43 U.S.C. 772 authorizes the resurvey of boundaries:

> The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system in that date provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of public lands remaining undisposed of: Provided, that no such resurvey or retracement shall be so executed as to impair the bona fide

Form OBD-183
12-8-76 DOJ

> rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.

The courts have viewed this statute as a broad grant of authority stating that, "[p]rior to title passing from the United States, it is undisputed that the Government has the power to survey and resurvey, establish and reestablish boundaries on its own lands." United States v. Reimann, 504 F.2d 135, 138 (10th Cir. 1974); see also, United States v. State Investment Co., 264 U.S. 206 (1924).[7/]

A. Plaintiffs Lack Standing to Litigate the Issue of the Inclusion of the Disputed Lands in the Indian Reservations.

Plaintiffs claim no interest in any of the lands alleged to be erroneously included as part of the reservations.[8/] Accordingly, they lack standing to litigate the issue of the ownership of land claimed by the United States. Yet it is plain that it is the title question which concerns plaintiffs. The crux of the Amended Complaint is that recognition of the disputed boundaries may result in the recognition of additional reserved rights for the Indian tribes which inhabit the reservations. But for these reservations it is clear that such reserved rights attach only to lands which the federal government holds in trust for the Indian inhabitants. See Arizona v. California, supra, 376 U.S. at 345.

7/ The authority of the Department of the Interior with respect to public lands is well-established. United States v. Schurz, 102 U.S. 378, 395 (1880); Cragin v. Powell, 128 U.S. 691, 697-699 (1888); Knight v. United States Land Association, 142 U.S. 161, 177-178 (1891); Johanson v. Washington, 190 U.S. 179, 185 (1903); Lane v. Darlington, 249 U.S. 331, 333 (1919).

8/ The statutory waiver of the sovereign immunity of the United States for quiet title actions does not extend to lands held in trust for Indian tribes. See 28 U.S.C. 2409a.

Form OBD-183
12-8-76 DOJ

The traditional standing rules provide several key limits to the invocation of federal court jurisdiction. Those limits were recently described by the Supreme Court in Valley Forge Christian College v. Americans United for Separation of Church and State, 50 U.S.L.W. 4103, 4106 (January 12, 1982):

> Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. at 499. In addition, even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches. Id., at 499-500. Finally, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Data Processing Service v. Camp, 397 U.S. 150, 153 (1969). (Footnotes omitted).

Plaintiffs cannot satisfy those standards. The well-established rule is that only holders of private rights affected by a resurvey may challenge that action. As the Supreme Court stated in Cragin v. Powell, 128 U.S. 691 (1888),

> . . . the power to make and correct surveys belongs to the political department of the government and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding . . . .

Form OBD-183
12-8-76 DOJ

> The reason of this rule, as stated by Justice Catron in the case of Haydel v. Dufresne, is "that great confusion and litigation would ensue if the judicial tribunals were permitted to interfere and overthrow the public surveys on no other ground than an opinon that they could have the work in the field better done and divisions more equitably made than the department of public lands could do."
>
> 128 U.S. at 699.

See also United States v. State Investment Company, 264 U.S. 206 (1924). The result is that plaintiffs who claim no interest in the lands affected by the questioned boundary decisions lack standing to litigate the issue of inclusion of the disputed lands within the reservations.

B. Plaintiffs Are Not Entitled to Judicial Review Under the APA.

Nor can plaintiffs bootstrap themselves into court on the basis of the APA. That legislation clearly defines those parties entitled to judicial review:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 5 U.S.C. 702.

Plaintiffs cannot satisfy this test.

The decision of the Ninth Circuit in Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965) discusses the question of standing for the invocation of judicial review under the APA. That case involved a challenge to administrative decisions affecting the eligibility of certain aliens to obtain visas to enter the United States. The aliens were joined by six agricultural corporations

Form OBD-183
12-8-76 DOJ

(the growers) as plaintiffs. The court's treatment of the standing of the growers who sought judicial review under the APA is instructive here. The growers argued that they had suffered a "legal wrong" within the meaning of the APA because "the practical effect" of the challenged decisions would detrimentally affect their ability to "effectively compet[e] with other businessmen in this labor force". The court refused to accept that allegation as a satisfactory basis for standing under the APA, stating:

> The phrase "legal wrong" under the Act means the invasion of a legally protected right. . . . Our inquiry then must be to determine if appellants have a legally protected right to be free of the effects ascribed to the administrative determinations. 350 F.2d at 707 (Citations omitted, emphasis in original.)

The court found plaintiffs' allegations of serious economic injury insufficient to support standing to sue.

A similar analogy in the present case reveals that plaintiffs cannot demonstrate any "legally protected right" in connection with the disputed administrative actions. Plaintiffs have no legal rights which are affected by the denomination of certain lands as trust lands. In fact, their legal rights remain precisely the same despite the disputed boundary decisions. Moreover their allegations of harmful practical effect are as insufficient here as were similar allegations to give them standing in Braude.

Plaintiffs likewise cannot satisfy the alternative test for APA standing as set out in Starbuck v. City and County of San Francisco, 556 F.2d 450, 457-458 (9th Cir. 1977):

orm OBD-183
2-8-76 DOJ

> The concept of "a person aggrieved" [as found in 5 U.S.C. 702] is a close relative of standing *** Claimants cannot be persons aggrieved unless "the challenged action had caused them" injury in fact, ". . . [and] the alleged injury was to an interest" arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated. (citations omitted.)

Plaintiffs have not suffered any injury in fact as a result of the recognition of the disputed boundaries. Plaintiffs allege that a potential diminishment of the water available to satisfy their water rights may result from the challenged actions. A number of assumptions underlie plaintiffs' assertions.

(1) They assume that the Tribes will be entitled to water rights permitting them to irrigate at least some of the lands encompassed within the challenged boundaries with priorities senior to those of plaintiffs.

(2) That all users with rights senior to those of the plaintiffs will put those rights to use in ensuing years.

(3) That California users will be limited to 4.4 million acre-feet per year sometime in the future.

(4) Finally, the Tribes must actually put to use all rights to which they may be entitled.

In sum, the disputed boundary decisions may, in connection with a series of other uncertain and unrelated events, lead to a decrease in the amount of water available to satisfy plaintiffs' legal entitlement. But such injury is remote at best and not susceptible to characterization as caused by the defendants' actions being challenged in this lawsuit. See Bowker v. Morton, 541 F.2d

Form OBD-183
12-8-76 DOJ

1347, 1349 (9th Cir. 1976) ("Plaintiffs may not rely on 'the remote possibility, unsubstantiated by allegations of fact that their situations . . . might improve were the court to afford relief."); Starbuck v. City and County of San Francisco, supra, 556 F.2d at 458 ("[A]ppellants cannot show the essential causal link between their injury and the Secretary's alleged inaction"). Indeed plaintiffs here cannot show that they will definitely be injured at all as a result of defendants' actions.

Even assuming arguendo that the injury to plaintiffs were sufficient to be considered an injury in fact, plaintiffs are not within the zone of interests protected by the statutes giving the Secretary authority to resurvey the questioned boundaries. As discussed above, the relevant statutes seek to protect parties whose claims to land may be affected by government surveys. The plaintiffs here do not satisfy that requirement. The result is that plaintiffs are not entitled to judicial review under the APA. They cannot claim that they have suffered any legal wrong or that they have suffered injury in fact and are within the zone of interests protected by relevant statutes. Accordingly, the APA provides no basis for judicial review here.

IV

THE SOVEREIGN IMMUNITY OF THE UNITED STATES BARS THIS LAWSUIT

A threshold question in any suit in which the United States is named as a defendant is whether Congress by statute has authorized the suit to be brought. The familiar rule is that

Form OBD-183
12-8-76 DOJ

the United States, as sovereign, is immune from suit unless it has consented to be sued. United States v. Sherwood, 312 U.S. 584, 586 (1941), Morris v. United States, 521 F.2d 872 (9th Cir. 1975). In the instant case since the plaintiffs may not evoke the APA as a waiver of sovereign immunity, plaintiffs are foreclosed from bringing suit.

The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter. Hawaii v. Gordon, 373 U.S. 57, 58 (1963); Dugan v. Rank, 372 U.S. 609 (1963); Malone v. Bowdoin, 369 U.S. 643 (1962); Larson v. Domestic and Foreign Commerce Corporation, 337 U.S. 682 (1949).

Metropolitan and Coachella seek specific declarations of the boundaries of the three Indian reservations, to enjoin the Secretary from delivering water to certain federal lands, and a declaration that certain lands are owned by the State of California. 9/ The relief sought is clearly against the United States although nominally against the Secretary. Larson v. Domestic and Foreign Commerce Corporation, supra, 337 U.S. at 687; Malone v. Bowdoin, supra; Dugan v. Rank, supra; City of Fresno v. California, 372 U.S. 627 (1963); State of Washington v. Udall, 417 F.2d 1310, 1317 (9th Cir. 1969). That being the case, the Secretary cannot be enjoined for treating the disputed lands as part of the Indian

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9/ Sovereign immunity would bar plaintiffs from litigating these issues in a quiet title action. 28 U.S.C. 2409a.

Form OBD-183
12-8-76 DOJ

reservations. Larson v. Domestic and Foreign Commerce Corporation, supra, is directly on point and controls the disposition of plaintiffs' claims especially insofar as Larson specifically overruled the earlier case of Goltra v. Weeks, 271 U.S. 536 (1926).

In a series of cases beginning with Larson v. Domestic and Foreign Commerce Corporation, supra, the Supreme Court has clarified the doctrine of sovereign immunity particularly with regard to actions in which the relief is nominally sought against a government officer. In Larson, the plaintiff brought suit against the head of the War Assets Administration alleging that the Administration had violated the terms of its contract by refusing to deliver certain coal to the plaintiff and entering into a contract to sell it to others. The prayer was for an injunction prohibiting the administrator from selling or delivering the coal to anyone other than the plaintiff and for a declaration that the sale to the plaintiff was valid and the sale to the second purchaser invalid. The Supreme Court held that such relief was barred by sovereign immunity since "the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers or their exercise in the particular case are constitutionally void." Larson, supra at 701-702.

In holding that the relief sought by the plaintiff in Larson was barred by the doctrine of sovereign immunity, the Court

Form CBD-183
12-8-76 DOJ

addressed itself to several questions which also appear in the instant case and hence merit discussion. First of all, the Court noted that the denomination of the party defendant by the plaintiff was not the sole test to determine whether a suit was against an officer individually or against his principal, the sovereign. "[T]he crucial question" the Court stated, "is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign." 337 U.S. at 687. As the Court explained:

> In each such case, the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained.
>
> * * *
>
> In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the government, but because it is, in substance, a suit against the Government over which the Court, in the absence of consent, has no jurisdiction. 337 U.S. at 688.

Further, in emphasizing that it is the substance of the complaint and not its form which will be determinative, the Court held that:

> Since the sovereign may not be sued, it must also appear that the action to be restrained or directed is not the action of the sovereign. The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True,

Form CBD-183
12-8-76 DOJ

> it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers, the action is the sovereigns and the suit to enjoin it may not be brought unless the sovereign has consented. 337 U.S. at 693.

The Court also rejected the argument that official action is invalid if based on an incorrect decision as to law or fact if the officer making the decision was empowered to do so, stating:

> We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign. 337 U.S. at 695.

The record in this case demonstrates that the facts which gave rise to this controversy mirror those which lead to Larson v. Domestic and Foreign Commerce Corporation.

First, M.W.D. and Coachella, like the plaintiff in Larson seek injunctive and declaratory relief. See Larson, supra, 337 U.S. at 684. Second, in this case as in Larson, the thrust of plaintiffs' complaint is that the officer is "wrongfully" holding property. Finally, plaintiffs here, like the plaintiff in Larson, are proceeding against the federal defendant on the theory that an action which is "wrongful" or "illegal" is, by definition, beyond the scope of that official's authority and subjects the official

Form CBD-183
12-8-76 DOJ

to suit. The Supreme Court found the theory to be erroneous. 337 U.S. at 692.

The upshot is that sovereign immunity forecloses this litigation against the United States. Although couched in the guise of review of secretarial action, plaintiffs here plainly seek to determine whether the federal government holds lands in trust for the Indian inhabitants of the three reservations. Thus, the action is against the United States and is barred by sovereign immunity.

V

THE FAILURE TO JOIN ARIZONA AND CALIFORNIA REQUIRES DISMISSAL OF PLAINTIFFS' SECOND, FOURTH AND SIXTH CLAIMS FOR RELIEF.

Assuming arguendo plaintiffs meet the test of 5 U.S.C. 702 or otherwise have standing and jurisdiction to challenge the Secretary's three orders, plaintiffs' second, fourth and sixth claims for relief must be dismissed since plaintiffs have failed to join the States of California and Arizona who are necessary and indispensable parties under Fed. R. Civ. P. 19.

A. The States of California and Arizona Are Necessary Parties.

Fed. R. Civ. P. 19(a) defines as necessary participants to a lawsuit those persons

> (1) . . . [in whose] absence complete relief cannot be accorded among those already parties, or (2) [those who claim] an interest relating to the subject of the action and is so situated that disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect his interest . . .

Form CBD-183
12-8-76 DOJ

The rationale is simply stated: "Whenever feasible, the persons materially interested in the subject of an action . . . should be joined as parties so that they may be heard and a complete disposition made." Notes of Advisory Committee, Rule 19, 1966 Amendment. See also, Schutten v. Shell Oil Company, 421 F.2d 869 (5th Cir. 1970).

In the present case plaintiffs have alleged facts which, if true, would conclusively demonstrate that the States of Arizona and California are necessary parties. Specifically in plaintiffs' second, fourth and sixth claims for relief, (paragraphs 32, 46, 70, 71, 74, 75, 94 and 95 of Plaintiffs' Amended Complaint), it is alleged that the United States is claiming land within the exterior boundaries of the three reservations (essentially the historic bed of the Colorado River) when such lands, according to plaintiffs, ". . . belong to the States of California and Arizona". But to state the obvious, if Arizona and California have claims to lands claimed by the defendant the two states have an interest in the outcome of any litigation that would determine title to those lands. Obviously, the two states cannot adequately protect their interests and the parties involved cannot hope for complete relief unless all those who have or claim an interest in these lands are joined. Wright and Miller, Federal Practice and Procedure 1621.

For this action to proceed both states must be present to assert their interests. The principle is well-established in property law that "whenever a party seeks to quiet title to a piece of land, he must join all known persons who are claiming

Form OBD-183
12-8-76 DOJ

title in order to settle the property's ownership without additional litigation". Wright and Miller, Federal Practice and Procedure 1621. See also, Reese v. Skelly Oil Company, 53 F.R.D. (S.D. Miss. 1971).

For the above stated reasons we submit that the States of Arizona and California are necessary parties to the instant case and pursuant to Fed. R. Civ. P. 19 should have been joined as parties by plaintiffs.

B. The States of California and Arizona Are Not Feasible Parties.

As discussed above, under Fed. R. Civ. P. 19 a necessary party must be feasible before the Court can order his joinder. A feasible party is one over whom the Court may assert personal jurisdiction and whose presence in the lawsuit would not destroy subject matter jurisdiction.

California and Arizona are not feasible parties under Fed. R. Civ. P. 19. The Eleventh Amendment clearly defines the limits to federal court jurisdiction over a state:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens of any Foreign State.

The Eleventh Amendment prohibits joinder of Arizona in this case, without its consent, since M.W.D. and Coachella are public agencies of the State of California with their principal place of business in California. Thus the suit would be "against one of the United States by citizens of another state". The

orm OBD-183
2-8-76 DOJ

Eleventh Amendment also bars suits against a state by its own citizens. See Eldemann v. Jordan, 415 U.S. 651 (1974). Hence, plaintiffs as citizens of California are foreclosed from obtaining jurisdiction over the State of California in federal district court as well.

The Court does not need to address the question of whether the two states may seek to intervene in this action since jurisdiction over conflicts between two states is reserved exclusively to the Supreme Court. 28 U.S.C. 1251.[10/] Accordingly, participation by the two states would preclude district court jurisdiction. At any rate, if the states were to intervene seeking to quiet title to certain lands, the sovereign immunity of the United States would bar the action. See 28 U.S.C. 2409a.

In sum the States of Arizona and California are necessary parties who cannot be joined, with or without their consent, in this action. Thus, pursuant to Fed. R. Civ. P. 19 the issue confronting the Court is whether "the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable".

10/ The fact that the subject of this action is title to land and not a political boundary question is irrelevant for California v. Arizona, 440 U.S. 59 (1979) is considerable authority that such a question is of sufficient magnitude to make assumption of jurisdiction by the Supreme Court obligatory. See Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972).

CBD-183
6 DOJ

C. The States of California and Arizona Are Indispensable to this Action and Therefore Plaintiffs' Amended Complaint Should be Dismissed.

Fed. R. Civ. P. 19(b) sets out four factors to be considered in determining "whether in equity and good conscience the action should proceed. . . ." The factors which "it identifies . . . will be most significant in most cases". Wright and Miller, Federal Practice and Procedure 1608. The following analysis of the four factors listed in Fed. R. Civ. P. 19(b) in relation to this case demonstrates that Arizona and California are indispensable to the resolution of the second, fourth and sixth claims for relief and that those claims should be dismissed.

1. To What Extent a Judgment Rendered in the Person's Absence be Prejudicial to Him or Those Already Parties.

Here the United States and the States of California and Arizona will be prejudiced if the three claims were to proceed in the absence of the states. Trial of the case without the two states, who are alleged to own the lands in question ". . . they would not be bound by the judgment or decree of this Court, and the prospect of multiple litigation against the defendants is not only a real possibility, but a probability". Reese v. Skelly Oil Co., 53 F.R.D. 548, 563 (S.D. Miss. 1971). That case involved a claim by lessees of oil and gas leases against Skelly Oil to remove cloud of title. There the Court applied the well-established rule that all parties who have an interest in the land must be joined to avoid multiplicity of actions or the case must be dismissed. That rule applies here as well.

Form OBD-183
2-8-76 DOJ

2. The Extent to Which by Protective Provisions in the Judgment, by the Shaping of Relief or other Measures, the Prejudice can be Lessened or Avoided.

The issues to be litigated under the second, fourth and sixth claims for relief are land ownership. In challenging the United States' title to certain lands, plaintiffs have alleged that title lies in the States of California or Arizona. Any decree that this Court would fashion in the absence of the two States would be hollow indeed. As stated in Reese v. Skelly Oil Company:

> Inasmuch as this litigation revolves around and is based upon conflicting claims of ownerships, this Court is unable to envision any decree which would effectively settle any controversy between the plaintiff and defendants without doing substantial practical injury to the plaintiff's lessors [absent party's] unassertable claims . . . . Any attempts to render a judgment or decree which would lessen this practical harm would result in a meaningless decree as well as the reasonable probability of additional multiple and costly litigation and possibly conflicting decisions.

Reese v. Skelly Oil Company, supra, 53 F.R.D. at 563.

The parallel can be seen in the present action. Any decree that this Court issues is subject to subsequent attack by either California or Arizona; thus subjecting the United States to additional litigation and all parties to the possibility of inconsistent decisions.

3. Whether a Judgment Rendered in the Person's Absence will be Adequate.

By definition, it would seem clear that if this Court cannot fashion a remedy which is not subject to attack either by Arizona or California then that remedy would indeed be inadequate.

Form CBD-183
12-8-76 DOJ

4. Whether the Plaintiff will have an Adequate Remedy if the Action is Dismissed for Non-Joinder.

This consideration is irrelevant in the present instance since plaintiffs claim no interest in the disputed lands which are alleged to be owned by the absent states. Thus they simply are not entitled to any remedy. At any rate, plaintiffs' concerns may be satisfied if the two states, the alleged owners of the historic riverbed, determine that the claims now advanced on their behalf by plaintiffs are sufficiently meritorious to warrant litigation.

Conclusion

Rule 19 requires a three step analysis before a Court may dismiss an action. The first question is whether the absent party is necessary to the action; second, the second step is a determination whether joinder of the absent party is feasible; and finally, if joinder is not feasible, is the absent party indispensable. Where joinder of a necessary party is not feasible but the party is indispensable, the Court must dismiss. Here the States of California and Arizona are necessary parties, but their joinder is not feasible. Since, the absent parties are indeed indispensable the plaintiffs' second, fourth and sixth claims for relief must be dismissed.

VI

PLAINTIFFS' ACTION FOR REVIEW OF THE SECRETARY'S ORDERS FOR THE COLORADO RIVER AND THE FT. MOJAVE INDIAN RESERVATIONS ARE BARRED BY THE STATUTE OF LIMITATIONS.

The three Secretarial orders challenged in the instant action were issued on the following dates: Quechan, December 20,

Form OBD-182
2-8-76 DOJ

1978; Fort Mojave, June 3, 1974; and Colorado River, January 17, 1969. As stated above, plaintiffs filed their case on July 21, 1981.

The applicable Statute of Limitations provides that: "Every civil action commenced against the United States shall be barred unless the Complaint is filed within six years after the right of action accrues." 28 U.S.C. 2401. This statute applies with equal force to actions for review of agency action as well as to any other type of civil action against the United States. 11/ In

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11/ Examining precursors to 28 U.S.C. 2401, it is evident that Congress sought to be as broad as possible in considering which actions were subject to a statute of limitations:

> " . . . all claims . . . founded in the Constitution or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counter-claims, claims for damages whether liquidated or unliquidated, or other demands whatsoever in the part of the Government of the United States against any claimant against the Government in said court . . . shall [not] be allowed . . . unless the same shall have been brought within six years after the right accrued . . . . 36 Stat. 1093 (March 3, 1911).

The logical conclusion is that Congress' use of the phrase "civil action" in 28 U.S.C. 2401 was to be just as broad - so as to include all contingencies.

Form OBD-183
12-8-76 DOJ

Crown Coat Front Co. v. United States, 386 U.S. 503 (1976), the Supreme Court ruled that 28 U.S.C. 2401 is not a limit upon administrative action, but only upon "the right to file a civil action, in the courts against the United States." Id. at 511. The issue in that case centered upon when the "right of action" of which 2401 speaks accrues. In finding that ". . . the right of action first accrues when administrative action is final . . ." id. at 509, the Court clearly implied that if an action were filed for judicial review more than six years after final agency action, then the action would be barred by 28 U.S.C. 2401. This view was followed in Oppenheim v. Campbell, 571 F.2d 660 (D.C. Cir. 1978), where the court, in analyzing the government's claim that an action for judicial review was barred by the statute of limitations held that review was timely sought after final agency action. Again, the clear implication was that 28 U.S.C. 2401 would have been a bar, had review been sought more than six years after final agency action. 12/

In the present action, plaintiffs have failed to file in a timely fashion that portion of the Complaint which challenges the order of the Secretary dated January 17, 1969, concerning the

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12/ D.B. Ford, Inc. v. United States, 380 F.Supp. 1202, (D. Minn. 1974) could be read as suggesting a different conclusion, however. In that case the court stated "although this action was commenced by a civil complaint, as a review of the Commission's order it is in the nature of an appellate proceeding pursuant to 28 U.S.C. 2321-2325." Id. at 1208. Significantly, 28 U.S.C. 2321-2325 "are silent as to time limitations for the bringing of actions to review orders of the Commission." Id. at 1208.

Form CBD-183
12-8-76 DOJ

boundaries of the Colorado Indian Reservation. Likewise, they have failed to file in a timely fashion the portion of their Complaint challenging the 1974 order of the Secretary concerning the boundaries of the Ft. Mojave Reservation. More than six years have elapsed since the decision became final and therefore, 28 U.S.C. 2401 precludes the instigation of the claims for relief affecting those orders. For this reason, plaintiffs' third, fourth, fifth and sixth claims for relief should be dismissed.

Respectfully submitted,

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Form CBD-183
12-8-76 DOJ

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 1982, I mailed postage prepaid a copy of the foregoing "UNITED STATES' MOTION TO DISMISS and MEMORANDUM IN SUPPORT THEREOF" to the following parties:

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Form CBD-183
12-8-76 DOJ

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SOUTHERN DISTRICT OF CALIFORNIA

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Civil 81-0678-GT-M

RE: The Metropolitan Water Dist. etc., vs. The U.S.A. etc.

You are hereby notified that Order - Case be stayed pending the Supreme Court's final ruling on the Special Master's report, in each of the above-entitled cases was XX Filed and XX Entered.

Date Filed 4-29-82 Date Entered 4-30-82

XX Copy enclosed ____ Copy not enclosed

When the time for appeal has expired (without appeal being taken) counsel must arranged for pickup of their exhibits without further notice. Unless you respond within thirty days, they will be destroyed or otherwise disposed of pursuant to Local Rule 125-3.

I hereby certify that this notice was mailed on 4-30-82.

WILLIAM W. LUDDY, Clerk

By S Miller Deputy

S.Miller

APR 29 1982

APR 30 1982

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California and the COACHELLA VALLEY WATER DISTRICT, a public agency of the State of California, Plaintiffs, v. THE UNITED STATES OF AMERICA, JAMES WATT, as Secretary, United States Department of the Interior, Defendants.	Civil No. 81-0678-GT(M) ORDER

The court may find sua sponte that the case is not ripe for decision. Bergstrom v. Bergstrom, 623 F.2d 517, 519 n.1 (6th Cir. 1980). Since the plaintiffs are complaining primarily of the anticipated impact of events which are still uncertain, the court finds that this case is not ripe for decision. See, e.g., City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231 (9th Cir.), cert. denied, 449 U.S. 1039 (1980); Young v. Klutznick, 652 F.2d 617 (6th Cir. 1981), cert. denied, 71 L.Ed.2d 650 (1982).

No actual loss of water will occur before 1985, the projected date for commencement of delivery of mainstream water by the Central Arizona Project. The Special Master, appointed by the Supreme Court in Arizona v. California, 439 U.S. 419, 436-437 (1979), issued his report on February 22, 1982.

Exceptions to the Special Master's report and briefs will now be filed with the Supreme Court. Moreover, in light of the recent Supreme Court decision in Montana v. United States, 450 U.S. 544 (1981), the Secretary of Interior may change the boundary determination again before the anticipated loss of water occurs.

In order to protect the plaintiffs from possible statute of limitations problems, rather than dismissing the case, the court will stay all proceedings in this case pending the decision of the Supreme Court. The court reaches no issues other than the ripeness issue and expresses no opinion on the ultimate resolution of the merits of this controversy. The court does not reach the issue of whether the statute of limitations has run on any of the plaintiffs' claims.

Accordingly, it is ordered that all further proceedings be stayed in this case pending the Supreme Court's final ruling on the Special Master's report.

IT IS SO ORDERED.

Dated: April 28, 1982

Gordon Thompson Jr.

GORDON THOMPSON, JR., Judge
United States District Court

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FILED
MAY 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 8, ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF ARIZONA,
COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,
DEFENDANTS

THE UNITED STATES OF AMERICA AND STATE OF NEVADA,
INTERVENERS

STATE OF UTAH AND STATE OF NEW MEXICO,
IMPLEADED DEFENDANTS

COLORADO RIVER INDIAN TRIBES, FORT MOJAVE INDIAN TRIBE, CHEMEHUEVI INDIAN TRIBE, COCOPAH INDIAN TRIBE, AND FORT YUMA (QUECHAN) INDIAN TRIBE,
RECOMMENDED INTERVENERS

Exception of the State of Arizona to the Report of Special Master Tuttle dated February 22, 1982 and Brief in Support of Exception.

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. RES JUDICATA, COLLATERAL ESTOPPEL AND LAW OF THE CASE	2
III. ARGUMENT	3
A. Introduction	3
B. Discussion of Law of Preclusion Doctrines	3
IV. RIFKIN REPORT OF 1960	19
V. THE SUPREME COURT OPINION	21
VI. DETRIMENTAL RELIANCE	22
VII. ARGUMENT	22
VIII. MODERATE LIVING	31
IX. ARGUMENT	31
X. TECHNOLOGICAL CHANGES	36
XI. ARGUMENT	36
XII. CONCLUSION	39

TABLE OF AUTHORITIES

CASES	PAGE
Aero Jet-General Corporation v. Askew, 511 F.2d 710 (5th Cir. 1975), cert denied, 423 U.S. 908 (1975)	5
Arizona v. California, 373 U.S. 546 (1963)	8,33
Baltimore S. S. Co. v. Phillips, 274 U.S. 316 (1927)	8
Behrens v. Skelly, 173 F.2d 715 (3rd Cir. 1948)	9
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)	12
Commissioner v. Summers 333 U.S. 591 (1948)	4
Cromwell v. County of Sac, 94 U.S. 351 (1877)	4
Hanson v. Hunt Oil Co., 505 F.2d 1237 (8th Cir. 1974)	7
Hatchitt v. United States, 158 F.2d 1237 (8th Cir. 1974)	9
Heckman v. United States, Corp. 349 U.S. 322 (1955)	4
Herendeen v. Champion International Corp., 525 F.2d 130 (2nd Cir. 1965)	7
Landrum v. Time D.C. Inc., 407 N.E.2d 777 (Ill. App. 1980)	5
Lawlor v. National Screens Service Corp., 224 U.S. 413 (1912)	4
Montana v. United States, 440 U.S. 147 (1979)	4
Oklahoma v. United States, 155 F.2d 496 (10th Cir. 1946)	5
Ripley v. Storer, 132 N.E.2d 87 (N.Y. 1956)	7
Rhodes v. Jones, 351 F.2d 884 (8th Cir. 1965)	7
Schroeder v. 171.74 Acres of Land, More or Less, 318 F.2d (8th Cir. 1963)	3

TABLE OF AUTHORITIES (Con't.)

CASES	PAGE
Schuykill Fuel Corp. v. B. & C. Niebery Realty Corp., 250 N.Y. 304, 165 N.E. 456 (1929)	6
Seaboard Coastline Railroad Co. v. Gulf Oil Corp., 409 F.2d 879 (5th Cir. 1969)	8
Sea Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974)	4,5
State of Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658 (1979)	31,33,34
Texaco, Inc. v. Hickel, 437 F.2d 636 (D.C. Cir. 1970)	3
United States v. California and Oregon Land Co., 192 U.S. 355 (1904)	9
United States v. Emmons, 351 F.2d 603 (9th Cir. 1965)	5
United States v. New Mexico, 438 U.S. 696 (1978)	7,12,34
United States v. Truckee-Carson Irrigation District, 649 F.2d 1286 (9th Cir. 1981)	4,9-12,23-24,30
Winters v. United States, 207 U.S. 564 (1908)	8,33,36
STATUTES	
McCarran Amendment, 43 U.S.C. 666 (1952)	12
RESTATEMENT	
Restatement of the Law of Judgments, §§ 47, 48	4
PERIODICALS	
Von Moschzisker, Res Judicata, 38 Yale L.J. 299	4

No. 8, Original

In the Supreme Court of the United States

October Term, 1981

State of Arizona,
COMPLAINANT

v.

State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, California, City of San Diego, California, and County of San Diego, California,

DEFENDANTS

The United States of America and State of Nevada,

INTERVENERS

State of Utah and State of New Mexico,

IMPLEADED DEFENDANTS

Colorado River Indian Tribes, Fort Mojave Indian Tribe, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and Fort Yuma (Quechan) Indian Tribe,

RECOMMENDED INTERVENERS

Exception of the State of Arizona to the Report of Special Master Tuttle dated February 22, 1982 and Brief in Support of Exception.

INTRODUCTION

Arizona files this separate brief in that there are certain issues which pertain only to Arizona and are not shared in common with the other State Parties. To the extent possible the State Parties have filed joint briefs, but Arizona

supplements that brief and adds to it as deemed necessary. All issues in both the joint brief and this separate brief are of significance and importance to the State of Arizona, and it concurs in the joint brief.

RES JUDICATA, COLLATERAL ESTOPPEL AND LAW OF THE CASE

EXCEPTION:

Arizona excepts to the Master's refusal to apply the preclusion doctrines of Res Judicata, Collateral Estoppel and Law of the Case to claims for increases in the 1964 decreed amounts for Indians on lands admittedly within the reservation boundaries at the time of the 1964 decree. ("Omitted Lands.")

PROPOSED FINDING:

The United States represented the Tribes, who are now parties in these proceedings in their role as trustee for the Tribes and therefore privity existed between the United States and the Tribes. All claims for irrigable acreage on the reservations were or should have been presented by the United States on behalf of the Tribes and the 1963 decision and 1964 decree of this Court are binding upon the United States and the Indian Tribes as to any claim for increased water rights on all lands which were within the Reservation boundaries as of the 1964 decree of this court.

PROPOSED ACTION:

That this Court enter its decision and order that the 1963 decision, and 1964 decree of this Court are binding upon the parties as to amounts of water decreed for Indian use on all lands located within the boundaries of the reservations as of the time of the 1964 decree.

ARGUMENT

A. Introduction

Shortly after the current proceedings were assigned by this Court to Special Master Tuttle the State Parties presented a motion to preclude the presentation of evidence relative to so-called "omitted lands." This motion was based upon the preclusion doctrines of res judicata, collateral estoppel, and law of the case. That motion was dated September, 1980. Thereafter, the Master ruled that he would defer a decision upon this motion until all evidence had been presented. The State Parties position was that since so-called "omitted lands" concerned lands which were admittedly within the Reservation boundaries as of the time of the 1964 Decree, the United States and the Indian parties were precluded from presenting evidence related to those lands.

B. Discussion of Law of Preclusion Doctrines

1. *General Discussion*

The doctrines of res judicata and collateral estoppel are related doctrines, sometimes referred to as "issue" or "claim preclusion." These doctrines serve the public policy of preventing continuous relitigation of matters once litigated. Justice, expediency and the preservation of public tranquality require that a matter once litigated be at an end. *Schroeder v. 171.74 Acres of Land, More or Less*, 318 F.2d 311 (8th Cir. 1963); See, *Texaco, Inc. v. Hickel*, 437 F.2d 636, 644 (D.C. Cir. 1970):

> It is sound and important policy in the administration of justice that what has already been done and determined not be redone and redetermined unnecessarily. This policy requires that courts not be niggardly in giving full effect to prior determinations of fact and right.

This Court had reason to consider res judicata in 1974 in *Sea Land Services, Inc. v. Gaudet*, 414 U.S. 573, 578-79 (1974), and stated:

> For res judicata operates only to bar 'repetitious suits involving the same cause of action. [The bar] rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissable matter which might have been offered for that purpose. *Cromwell v. County of Sac*, 94 US 351, 352 [24 L Ed 195]. The judgment puts an end to the cause of action, which cannot again be brought into litigaton between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. *See* Von Moschzisker, Res Judicata, 38 Yale L J 299; Restatement of the law of Judgments, §§ 47, 48. *Commissioner v. Sunnen*, 333 US 591, 597, 92 L Ed 898, 68 S Ct 715 (1948).'

A final judgment on the merits of those matters which were actually litigated and all matters which could have been litigated is binding upon the parties and their privies. See *Commissioner v. Sunnen*, 333 U.S. 591 (1974); *Cromwell v. Sac County*, 94 U.S. 351 (1876); *Montana v. United States*, 440 U.S. 147 (1979); and *Lawlor v. National Screens Service Corp.*, 349 U.S. 322 (1955).

2. *Parties or Those in Privity*

The United States in the first trial of this matter represented the Indians as their trustee. In this capacity the United States binds the Indian tribe and the individual Indians. *Heckman v. United States*, 224 U.S. 413, 445-56 (1912), and *United States v. Truckee-Carson Irrigation*

District, 649 F.2d 1286 (9th Cir. 1981); see also *United States v. Emmons*, 351 F.2d 603 (9th Cir 1965); *Oklahoma v. United States*, 155 F.2d 496 (10th Cir. 1946). *Sea-Land Services, Inc. v. Gaudet, supra*, also decided that not only parties to the litigation but those in privity with parties are bound.

3. *Issues Presented or Which Could Have Been Presented*

In *Sea-Land Services, Inc. v. Gaudet, supra*, this Court decided that any matter which was presented or any other admissible matter which might have been offered are precluded by the doctrine of res judicata.

Not only have the courts indicated that matters which could have been raised will be precluded, but they have also imposed an affirmative duty to raise all claims that are a part of or a defense to an asserted cause of action. *Aero Jet-General Corporation v. Askew*, 511 F.2d 710 (5th Cir. 1975), cert. denied, 423 U.S. 908 (1975); *Landrum v. Time D.C. Inc.*, 407 N.E.2d 777 (Ill. App. 1980).

That the United States on behalf of the Indians consciously made a decision to present only the evidence which it presented at the trial despite the fact that there may have been other so-called irrigable acreage on the Reservations is made clear by the following exchange between Master Rifkin and Mr. Warner, the United States Attorney in the previous trial:

THE MASTER: The question is whether the maps constitute the definition of what you regard as irrigable . . . .

MR. WARNER: Well that is how we are defining 'irrigable' for the purpose of proving the claim that is being asserted.

THE MASTER: And although there may be other irrigable lands within those reservations, those you do not lay claim for the service of water upon?

MR. WARNER: That is correct.

THE MASTER: Alright. That is ... the way we are going to be bound. This is a statement that I will take seriously." (Tr. at 14155)

Yet now the United States and the Indian Tribes suggest that because of "inadvertent omissions, as well as erroneous judgment, in identifying irrigable acreage . . .," (see Motion of United States for Modification of Decree and Supporting Memorandum, dated December 21, 1978), the issues should be relitigated despite affirmatively announcing to Master Rifkin that even though there was other irrigable land within the reservations, they did not intend to lay claim for service of water upon those. The current United States' attorneys seek to label that conduct as an inadvertent omission. It was anything but inadvertent, rather it was a conscious decision.

4. *Same Cause of Action*

Courts have developed three tests which may be used to determine whether the same cause of action is involved. Application of each of those three tests clearly shows how the present claim is part of the same cause of action litigated previously.

One of the most common tests is the "impairment of rights" test:

> A judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first. *Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250 N.Y. 304, 165 N.E. 456, 457 (1929); cited

with approval in *Ripley v. Storer*, 132 N.E.2d 87 (N.Y. 1956); *Herendeen v. Champion International Corp.*, 525 F.2d 130 (2nd Cir. 1965); and *Hanson v. Hunt Oil Co.*, 505 F.2d 1237 (8th Cir. 1974).

The impairment of the States' rights in this case is obvious. "When ... a river is fully appropriated federally reserved water rights frequently require a gallon-for-gallon reduction in the amount of water available for water needy states and private appropriators." *United States v. New Mexico*, 438 U.S. 696 (1978). In this case each additional gallon of water which is appropriated to the tribes *will* result in one less gallon of water available for use by the State Parties. The magnitude of the impairment becomes obvious when the scarcity of western waters and the importance of the Colorado River are considered. It is not and cannot be disputed that the Colorado River serves the area as the primary source for allocating a scarce area resource.

A second test used to compare causes of action is the "operative facts" test. As indicated in *Rhodes v. Jones*, 351 F.2d 884, 886 (8th Cir. 1965), "[t]he word claim denotes ... the aggregate of operative facts which give rise to a right enforceable in the courts." Where the aggregate of operative facts which give rise to the right has not changed, the asserted claim involves the same cause of action. It is important to note that attention is to be focused on the facts which give rise to a right, not the evidence that would prove the basis for recovery.

The present omitted lands claim arises out of the same operative facts which gave the United States the right to claim water rights twenty years ago. Those operative facts can briefly be summarized as:

1. The United States' desire to divert water from the Colorado River for Federal purposes, including water for use on the reservations;

2. The right to such waters is based upon the federal reserved water rights enunicated in *Winters v. United States*, 207 U.S. 564 (1908); and
3. The amount of water which is to be reserved is based upon the practicably irrigable acreage on the reservations.

The practicably irrigable standard was adopted by the Supreme Court when it stated:

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the *water was intended to satisfy the future as well as the present needs of the Indian Reservations* and ruled that *enough water* was reserved *to irrigate all the practicably irrigable acreage on the reservations*... We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservation can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable. *Arizona v. California*, 373 U.S. 546, 600-601 (1963). (Emphasis added.)

Despite the Supreme Court's finding that Special Master Rifkin's determination of irrigable acreage was reasonable, the United States now seeks to introduce new evidence to show that there are more practicably irrigable acres within the area already considered by Special Master Rifkin. Such new evidence does not create a new cause of action but merely requests a redetermination of what has already been litigated.

A final cause of action test which has been applied by courts is whether the primary right and duty and the delict or wrong are the same in each action or whether the same right has been infringed by the same wrong. See *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927); *see also Seaboard Coastline Railroad Co. v. Gulf Oil Corp.*, 409 F.2d 879 (5th Cir. 1969). The primary right is the right of the Tribes to divert water from the Colorado River for use on a reservation. The delict in each case is the diversion of water in

derogation of that right. Certainly no new right or wrong is involved here. The United States and the tribes merely desire a larger slice of the pie.

Splitting a cause of action to allow for the litigation now, of a claim based solely on evidence which should have been raised in the previous action, is contrary to the application of any of these three tests. The mere ability to show additional evidence to support an additional ground for relief is not enough to show any additional cause of action. *Behrens v. Skelly*, 173 F.2d 715 (3rd Cir. 1948). The United States and the Tribes should not be allowed to divide this cause of action for the purpose of relitigating portions of reservation land solely on the grounds that a new and greater recovery can be proved. *See United States v. California and Oregon Land Co.*, 192 U.S. 355 (1904); *Hatchitt v. United States*, 158 F.2d 1237 (8th Cir. 1974).

5. *Application of Preclusion Doctrines in Indian Water Rights Litigation*

An instructive case for this matter is *United States v. Truckee-Carson Irrigation District, supra*, in which the Honorable Elbert Tuttle participated as one of the three judges. That case, in a large degree, parallels this litigation. The court at the outset of its decision stated:

> The question raised in this appeal is whether an equitable water adjudication filed by the government in 1913 and finalized in 1944 precludes this cause of action. *Id.*, 649 F.2d at 1289.

The court at page 1302 of the decision stated:

> The purpose of the proceeding was to obtain a decree upon which all parties could rely. *This purpose would have been defeated if the government's action did not include important claims that could upset the decreed rights of the parties.* (Emphasis added.)

(Later in this brief, where the transcript of the previous trial is discussed in detail, it will be shown that the United States intended its evidence to be a comprehensive presentation and adjudication of the Indian rights involved.)

In the Truckee-Carson decision the Ninth Circuit outlined the history of that litigation. In 1913 the United States filed, in the United States District Court in Nevada, an equitable action which included a claim upon behalf of the Pyramid Lake Indian Reservation for federally reserved water rights. The Court stated:

> The government did not assert a claim for water to sustain the Pyramid Lake Fishery. *Id.*, 649 F.2d at 1289.

After a 1944 decree, the United States in 1973 instituted the action, that the Ninth Circuit was deciding, on behalf of the Pyramid Lake Paiute Tribe seeking reserved water rights to fulfill the purposes of the Pyramid Lake Reservation, including the maintenance of water levels in Pyramid Lake for fishery purposes. In 1974 the tribe intervened as a party and the Court stated:

> The complaint purported not to 'dispute the rights decreed' in the Orr Ditch action but only to secure 'additional rights' for the United States and the Tribe, with priority dates superior to those of the defendants. *Id.*, 649 F.2d at 1295.

The Court then pointed out that many of the defendants raised as affirmative defenses the preclusive effect of the Orr Ditch Decree and that the plaintiff sought to avoid preclusion on equitable grounds as well as the impermissible conflict of interest of the United States government. Thus, the Truckee-Carson decision parallels the situation before this Court almost exactly.

The District Court handled proceedings differently than Special Master Tuttle did in that it bifurcated the trial to consider the res judicata issue separately from all other issues. After trial concerning the issue of res judicata the

District Court held that the Orr Ditch Decree was res judicata and dismissed the complaint in its entirety. This action the Ninth Circuit upheld as to all defendants except the Truckee-Carson Irrigation District, because it was a non-party being represented by the United States at the same time the United States was representing the non-party Indians.

The tribe in the Truckee-Carson case submitted three arguments as to why the preclusive doctrine should not prevent their claim. They claimed first that different evidence would be required to sustain a fishery water right than an irrigations right. Secondly, the tribe suggested that the government intended to assert only a cause of action for irrigation water, not for all reservation purposes. Thirdly, it claimed that in equitable water adjudications only claims actually litigated merge into the final decree. The Court rejected all three assertions.

As to the first assertion, the Court found that the basis for either kind of a reserved right would be the same:

> [T]he executive actions by which the Reservation was established, and the intent that motivated those actions. *Id.*, 649 F.2d at 1301.

The Court pointed out the water rights are appurtenant to the same reservation and relate to the same source of water. The only different evidence would be a determination of quantity which in itself was insufficient to distinguish the cause of action. The Court discussed the fact that the United States might have sought a decree leaving open the possibility of expanding the tribes water rights, as in *Conrad Investment Co. v. United States*, 161 F. 829 (9th Cir. 1908). Instead it chose a comprehensive adjudication (discussions elsewhere in this brief show the United States chose the same comprehensive adjudication in this matter).

Likewise, the Court rejected the argument by the tribe that in an equitable proceeding only the issues actually litigated are barred by preclusive doctrines. *Id.*, 649 F.2d at 1302.

The Court also found significant the fact that Congress and the Supreme Court have recognized that finality in water adjudications cannot be obtained when reserved rights remain unsettled, citing 43 U.S.C. § 666 (McCarran Amendment), passed by Congress in 1951, also citing decisions of this Court in *United States v. New Mexico*, 438 U.S. 696, 98 S. Ct. 312, 57 L.Ed.2d 1052 (1978), *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810-11, 96 S. Ct. 1236, 1242-1243, 47 L.Ed.2d 483 (1976), and other authorities. *Id.*, 649 F.2d at 1308. The Court recognized that many defendants and other persons had relied heavily on the finality of the decree. They then held that not only defendant parties but subsequent appropriators who were not parties to the Orr Ditch case but who have reasonably relied upon the finality of the Orr Ditch Decree are entitled to rely on its finality. To not allow subsequent appropriators to rely would "... make it impossible ever finally to quantify a reserved water right." *Id.*, 649 F.2d at 1308-09.

The Court after discussing the various public policy matters, including those related to the preclusive doctrines, and the high value placed on the nations duty to protect Indian resources, stated:

> Nevertheless, we hold the policies served by res judicata preponderate. *Id.*, 649 F.2d at 1308.

6. *Discussion of Prior Trial. Master's Report, Court Decision and Decree*

The question of the finality of the claims for water for the reservation lands was raised several times in different

contexts in the first hearings. For example, in the Opening Statement for the claims of the United States its attorney represented that their presentation would make reconsideration of any decision arising therefrom unnecessary:

> MR. WARNER: (The United States Attorney) . . . [I]f the decree herein does determine the full quantity of rights reserved for the Indian reservations on the basis of all presently foreseeable needs, including full development of the irrigable lands which water is claimed, . . . any additional quantity which might be required for presently unforeseeable needs would be so unlikely to involve a significant quantity that that possibility can, as a practical matter, properly be excluded from consideration. Pr. Tr. at 12468-69.

Subsequently, the attorney for the United States reiterated that they were presenting evidence for the "full quantity of rights reserved":

> THE MASTER: Mr. Warner told me that he wanted water for the ultimate, future maximum capacity, potential and other words meaning 'without limit' for the Indians . . . I thought he was going to give me evidence of the maximum capacity of the land to receive water.
>
> MR. KIECHEL: (Department of Justice Attorney) That we will, your Honor . . . Pr. Tr. at 12746.

Throughout the presentation of the United States, a continuing question of justiciability caused frequent discussion of the finality of a possible decree and who would be bound by it. Prompting this was the preception that a binding and enforceable decision was the ultimate objective of all of the parties. See. Pr. Tr. 12935-36. See generally, Pr. Tr. 12858-

951, 13007-10, 13141-43 and Pr. Tr. Vol. 26, 1-96 (special session of August 20, 1957). The consideration focused on whether all claims of water users along the Lower Basin of the Colorado River would have to be brought into the adjudication in order to reach a meaningful decree and whether the whole matter would be justicible if all of those claims were presented. Throughout this discourse was the uniform recognition that there was no question that the parties and the tribes would be bound by the resulting decree and that it could be res judicata to claims that were or could have been presented in those hearings. In that context, the following exchange occurred:

MR. WARNER: Whether that decree [resulting from the present adjudication] will also bind the individual users within the state is the question which I am presently uncertain.

THE MASTER: What good does it do if it binds Arizona, but does not bind Mr. Arizona?

MR. WARNER: What good?

THE MASTER: Yes. After all, when you have a lawsuit, it is going to be a lawsuit with the contending user, rather that the State of Arizona.

THE MASTER: My suggestion is, unless you do get the contending user bound by the decree, your decree is worthless.

MR. WARNER: I don't think it will be worthless, your Honor.

THE MASTER: Will it be *res adjudicata*?

MR. WARNER: It will at least serve the purpose, yes; *res adjudicata* as establishing what is the maximum quantity of water that may be used with respect to the reservation — (Emphasis added.) Pr. Tr. at 12935.

The Master later added his agreement that, as between the States, United States and the Tribes, a decree would be binding:

MR. WARNER: ... This is an interstate case that the United States came into to assert its rights as against all rights which are represented by the party states in that case. This is one type of right that the United States claims. It has to try that right out against those who are parties to the case.

THE MASTER: I understand. It will get a decree which is good against the State of Arizona.

...

MR. WARNER: In this case we happen to have the United States in here asserting these proprietary interests and in a sense the United States is doing it in its proprietary capacity, its fudiciary capacity, and I suppose to some extent in its sovereign capacity.

THE MASTER: I have no doubt that the Indians are here because the Congress has enacted [sp.] the Attorney General represent the Indians, so they have a lawyer in Court ... Pr. Tr. 12946-48.

Finally, Mr. Warner reiterated to Special Master Rifkin, during an exchange concerning the type of evidence the United States utilized to demonstrate "irrigable lands", that the government was asserting all of its claims at that time and would be satisfied with a decree based upon its presentation:

[During the cross-examination of Mr. Robert H. Rupkey, a witness for the United States concerning irrigation on the Colorado River Reservations]

MR. ELY: (Attorney for California) Are there lands that are irrigable but not shown as such upon your maps with respect to the Colorado River Indian Reservation?

MR. WARNER: If your Honor please, Mr. Ely might define what he conceives "irrigable" to mean.

THE MASTER: I assume he is using the witness's definition.

MR. ELY: Exactly.

MR. WARNER: The witness has defined "irrigable" as used on these maps as being those lands which could be served by the existing or proposed project.

. . .

THE MASTER: Is that your definition of "irrigable"; those that can be served by existing or those presently proposed on the map? I did not gather that, but may be that is your definition.

THE WITNESS: That was what was intended; yes.

. . .

MR. ELY: I am using "irrigable", your Honor in whatever sense Mr. Warner used it in his opening, in stating that irrigable lands constitute the only criteria for the claim for Indian water. But I am trying to find out whether we may rely upon these maps as limiting that claim or not.

. . .

THE MASTER: All right. Now you want a concession from Mr. Warner as to whether this is a Bill of Particulars?

MR. ELY: Yes.

THE MASTER: Is it, Mr. Warner?

. . .

MR. WARNER: . . . as reflected by these maps and by the other testimony will define the maximum claim which the United States is asserting in this case.

THE MASTER: No. The question is whether the maps illustrate and define the term "irrigable" as used in your claim.

MR. WARNER: . . . *I can give this assurance: that we do not propose to ask a decree allowing water in favor of the — for the use of the Indian reservations in excess of the proof that we are offering in this matter.*

THE MASTER: I understand that. The question is whether these maps constitute the definition of what you regard as irrigable. I think it is a fair question.

MR. WARNER: Well, Your Honor, that is how we are defining "irrigable" for purposes of proving the claim that is being asserted.

THE MASTER: And *although there may be other irrigable lands within those reservations, those you do not lay any claim for for the service of water upon?*

MR. WARNER: *That is correct.*

THE MASTER: *All right.* That is what we know, and *that is the way we are going to be bound. This is a statement which I will take seriously.*

MR. WARNER: All right.

THE MASTER: Because he has limited himself; and I take it now by what you say, you are limiting yourself by lands which are irrigable for works presently existing or which are shown as proposed on these maps. . . . Now, I want you to realize that you are limiting your claims to those lands as irrigable within that definition; namely, those

capable of being served by existing works or proposed works as shown on these maps.

. . .

MR. WARNER: If Your Honor should make a report recommending a decree allowing all the water that is necessary for those purposes; we will be satisfied.

THE MASTER: That is not a condition I will accept. I shall assume that the categories of lands indicated on the Indian reservation on these maps constitute your Bill of Particulars to what you regard as irrigable within the terms of the United States claim, subject to correction that you can bring to our attention if there is some clerical error, in the course of the trial, but otherwise, I shall assume that that is your Bill of Particulars.

MR. WARNER: I might say that I think —

THE MASTER: That is your intention.

MR. WARNER: — that I think is correct. Pr. Tr. 14152-57. (Emphasis added)

At page 13799 of the transcript Special Master Rifkin indicated that the occasion for the trial of the Indian claims arises out of and only out of the desire of the United States to use the present jurisdictional opportunity to establish Indian uses throughout the Basin as a precaution against future contests.

The desire of Special Master Rifkin to obtain a final and binding decree is evidenced in the transcript from the previous proceedings at 12456. There, Mr. Warner, the United States attorney, made the assertion that the Indians could come back at a subsequent time to seek a modification of any decree. The Special Master stated that if that were the type of decree adopted, it would mean that nobody else

could rationally develop or utilize the surplus water because no one would be willing to invest under such a cloud of uncertainty.

> THE MASTER: ... nobody else, to all intents and purposes, could rationally develop the utilization of the surplus water. You certainly would not want to spend a lot of money for the development.
>
> ...
>
> THE MASTER: You would not want to give an opinion of counsel to an underwriting house selling a bond issue? Pr. Tr. at 12456.

It cannot be doubted that the United States recognized its obligation in the first proceedings to prove the full Indian claims to the extent that they could. Mr. Warner so stated:

> MR. WARNER: ... I think it is our duty to prove the Indian claims to the full extent we can prove them. Pr. Tr. at 12564.

A strong indication of the intent of Special Master Rifkin to finally and fully adjudicate Indian water right claims is contained in the discussion and the transcript at pages 12646 through 12648. There Master Rifkin indicated that if an open decree were to be adopted concerning the Indian water right claims he would receive and consider only evidence of present Indian uses because in the future Indians could present additional evidence if the need arose. However, Special Master Rifkin did not limit the evidence to present Indian uses but received evidence from the United States of all practicable irrigable acreage on the reservations which the United States felt it could prove.

RIFKIN REPORT OF 1960

The December, 1960, report of Master Rifkin reiterated his concern for finality, where he wrote:

> [T]he claims of the United States to water from the Colorado River for the benefit of Indian reservations are of such great magnitude that failure to adjudicate them would leave a cloud on the legal availability of substantial amounts of mainstream water for use by non-Indian projects ... [F]ailure to adjudicate it will leave non-Indian users in doubt as to the water available for their use, and since this controversy has been properly presented in this case, it is appropriate to adjudicate it here. Special Master Report, at 256 and 257 (December 5, 1960).

The report continues with the discussion of various types of decrees which could have been adopted to resolve the need to deal with uncertainty in future needs and the need for finality:

> One possibility would be to adopt an open-end decree, ... However, such a limitless claim would place all junior water rights in jeopardy of the uncertain and unknowable. Financing of irrigation projects would be severely hampered if investors were faced with the possibility that expanding needs of an Indian reservation might result in a reduction of the project's water supply.
>
> ...
>
> The other possibility, which would avoid the serious disadvantage of creating uncertainty as to the extent of the reserved rights, would be to predict the ultimate needs of each Reservation and decree that much water for its future use. Id., at 263-264.

After weighing the various possibilities and interests, Special Master Rifkin concluded:

> Therefore, the most feasible decree that could be adopted in this case, ... would be to establish a water right for each of the five reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the Reservation ... *This will preserve the full extent of the water rights created by the*

> *United States* and will establish water rights of fixed magnitude and priority as to provide certainty for both the United States and non-Indian users. Id. at 265. (Emphasis added.)

Special Master Rifkin clearly intended for the decree to be final - "of fixed magnitude." This quantity in turn was set as an amount sufficient for the "practicably irrigable" acreage, as he interpreted that term from the presentation of the United States' evidence. In other words, all lands that would be irrigated from then existing or proposed irrigation works. *See*, Pr. Tr. 14155-56.

THE SUPREME COURT OPINION

This Court made apparent its agreement with Special Master Rifkin's desire to finally determine all water rights for undisputed reservation lands in its 1963 opinion. Moreover, it expressly upheld Master Rifkin's finding of irrigable acreage:

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservation and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the Reservation ... We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the Reservation can be measured is irrigable acreage. *The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable.* 373 U.S. at 600-601. (Emphasis added.)

It does not logically seem open to dispute that both Special Master Rifkin and this Court intended for the decree to be binding as to the United States and their Indian wards with respect to Indian water rights adjudicated in the prior proceedings. This Court should now so order.

DETRIMENTAL RELIANCE

EXCEPTION:

Arizona excepts to the Master's finding that its reliance on the 1964 Decree of this Court "... might not be sufficient to foreclose the present claims."

PROPOSED FINDING:

Arizona has relied extensively on the amounts of water decreed to Indian Tribes in 1964 and to now increase the decreed amounts will seriously and detrimentally impact on the State of Arizona and its plans to use Colorado River water in Central Arizona by means of deliveries through the Central Arizona Project. This detrimental reliance and the impact resulting to the State now precludes a reopening of the 1964 decree to award additional amounts of water to the five Tribes.

PROPOSED ACTION:

That this Court enter its decision and order denying any increase of water rights over the 1964 decreed amounts for the four reservations which have lands located within the State of Arizona for so-called "omitted lands" and ordering that the 1964 decree is binding upon the parties as to amounts of water decreed for Indian use on all lands located within the boundaries of the reservations as of the time of the 1964 decree.

ARGUMENT

Having initiated this action to judicially ascertain its Colorado River entitlement, the 1963 decision and 1964 Decree of this Court have served as a benchmark upon which all planning has been based, and upon which reliance has been centered for the past 18 years in Arizona. The report of Master Tuttle, at page 38, states: "... Arizona appears to present the most compelling case of detrimental reliance." Indeed Arizona feels its case requires the "omitted land" claims to be denied.

Detrimental reliance is an important feature of preclusion doctrines discussed in the briefs of State Parties. In a context almost identical to this current proceeding, the Ninth Circuit decided *United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286 (1981). The Court in that action stated:

> This action was filed by the government on December 21, 1973. The complaint purported not to *"dispute the rights decreed"* in the Orr Ditch action but only to secure *"additional rights"* for the United States and the Tribe, with priority dates superior to those of the defendants. *Id.*, 649 F.2d at 1295. (Emphasis supplied.)

(That is precisely what the United States and the Indian Tribes are attempting to do in this action.) One of the defenses raised as an affirmative defense was the preclusive effect of the Orr Ditch Decree. The Court stated:

> The plaintiffs sought to avoid preclusion on equitable grounds and on the ground that in the Orr Ditch case the government plaintiff had an impermissible conflict of interest. *Id.*, 649 F.2d at 1295.

The Ninth Circuit indicated its concern with protecting those who had relied on the prior litigation.

> We must also protect adverse parties who have reasonably relied on the government's authority in the ligitation. *Id.*, 649 F.2d at 1301.

The Court also said:

> There is no question that the Orr Ditch defendants and many others have relied heavily on the finality of the decree. *Id.*, 649 F.2d at 1308.

The Court even went so far as to hold:

> . . . the subsequent appropriators who were not parties to Orr Ditch but who have reasonably relied on the finality of the Orr Ditch Decree are entitled to rely on its finality. *Id.*, 649 F.2d at 1308.

With these principles in mind, Arizona proceeds to a discussion of its reliance on this Court's Decree in 1964. The chief witness in presenting this case was Mr. Wesley E. Steiner, currently serving as the Director of the Department of Water Resources of the State of Arizona. His testimony on direct was presented beginning on page 2681 of the transcript and ending on page 2754.

Mr. Steiner graduated from the University of California at Berkeley in 1950 with a Bachelor of Science Degree in civil engineering. He then worked for the State of California until February of 1969 in the Division of Water Resources. At that time he came to the State of Arizona, as the State Water Engineer and Executive Director of the Arizona Water Commission and now serves as Director of the Department of Water Resources for the State of Arizona. He has 30 years plus in water resources work, 25 years of that service having been largely devoted to the Colorado River.

As early as 1922 plans began to develop for constructing a project to bring water from the Colorado River to the dry central portions of the State of Arizona. The name given to this planned project was the Central Arizona Project. The Central Arizona Project is a system of pumping plants and aqueducts to bring Colorado River water from Lake Havasu to the metropolitan areas of Phoenix and Tucson, and also to agricultural users of water in primarily three counties of the State of Arizona. Those counties are Maricopa, Pima and Pinal. It also delivers water for use by twelve Indian tribes in central Arizona.

Early congressional efforts to obtain legislation to bring water from the Colorado River failed because of opposition by the State of California. (Tr. 2686). The opposition from California was based on the fact that Arizona did not have the necessary water rights to support the project and Congress directed Arizona to confirm its water rights in court

(TR. 2687). It was this effort to judicially affirm its water rights which resulted in the 1963 decision and 1964 decree. Renewed efforts before the Congress soon followed the decree (TR. 2689).

The decreed amounts of water to the five tribes who now seek additional water was of utmost importance in planning and presenting testimony before the Congress to obtain enactment of legislation which would authorize construction of the Central Arizona Project. All decreed amounts had to be deducted from Arizona's entitlement, therefore, in order to determine how much water would be available for delivery by the Central Arizona Project. Therefore, reliance upon the amounts of water decreed to the five tribes in this litigation was imperative.

Not only Arizona witnesses, but federal witnesses, relied upon the decreed amounts (including the Indian decreed amounts) in presenting their testimony to the various congressional committees considering authorizing legislation for construction of the Central Arizona Project. Congress and interested users in Arizona had to know how much water would be delivered so that they could determine the economic feasibility of the project. Having been convinced that Arizona had confirmed its water rights in the 1964 Decree of this Court and in reliance upon the testimony of witnesses that certain amounts of water could be delivered through the Central Arizona Project, and in reliance upon the fact that that amount of water would afford a positive cost benefit ratio for the project, Congress enacted authorizing legislation in 1968 and the President signed the law September 30, 1968 (TR. 2693). Colorado River Basin Act. Pub.L.No. 90-537.

Arizona, having relied upon the 1964 Decree before Congress, and having received favorable action by Congress, immediately proceeded to implement this legislation. Efforts in conjunction with the federal government began in earnest. One of the early requirements of the United States before construction could be implemented was that Arizona

establish an entity with taxing power to contract with the Secretary of Interior for the delivery of the water through the Central Arizona Project so that assurance of repayment of the reimbursable features of the Project could be given. The Arizona Legislature acted promptly to grant legislative authority, and in 1971 legislation authorizing the formation of a multi-county water conservation district was passed. This law is contained in Chapter 13, Title 45, of the Arizona Revised Statutes. Section 45-2603 Arizona Revised Statutes, authorized the imposition of an ad valorem tax.

Shortly thereafter a three-county conservation district was established covering the three counties of Maricopa, Pinal and Pima. At the time Mr. Steiner testified the district had levied and collected ad valorem taxes for the past six years from the residents of those three counties, and taxes had been paid in the amount of approximately nine and one-half million dollars (TR. 2695). Following enactment of the statute that permitted establishment of the multi-county repayment district, construction of the Central Arizona Project was undertaken by the federal government. To date 932 million dollars has been appropriated by the Congress for construction of the Project based on reliance on the 1964 decree.

Because Arizona is located in such a water short area of this nation, as its population and its economy grew the amount of groundwater pumped from beneath the surface far exceeded the amount of natural recharge. Water to be transported to Central Arizona by the Central Arizona Project would in part alleviate the two and a half million acre feet of annual groundwater mining which is occurring in the State of Arizona. In order to further attempt to alleviate that situation, the Act authorizing the Central Arizona Project required that only those lands with a recent

history of irrigation (5 years) receive water from the Project (TR. 2619). Arizona relied, in agreeing to this requirement, on using Colorado River water to alleviate groundwater overdrafting.

The Secretary of the Interior in order to further control the amount of groundwater pumping requested that Arizona have its legislature enact a comprehensive and restrictive groundwater management act. Arizona in reliance upon receiving the remainder of the water which was judicially determined to be Arizona's portion by this Court enacted such legislation. Arizona Revised Statutes 45-401 et. seq. The program set forth in this Management Act is predicated upon the receipt of planned for and relied upon amounts of water through the Central Arizona Project. It won't function as envisioned without those supplies. The Management Act created active management areas in four parts of the State of Arizona where groundwater usage is greatest. Relying upon the receipt of the full remaining entitlement of Arizona's share of Colorado River water through the Central Arizona Project the legislature required reduction in groundwater pumping so as to achieve safe yield in the three urban active management areas by the year 2025. Safe yield means there will be a balance between consumption of water and water supply so that mining of groundwater will no longer occur (TR. 2722 through 2723). If the new amounts of water recommended by Special Master Tuttle are given to the Indian reservations in question, Arizona's reliance in enacting its groundwater management act will have been in vain, and to the extent that the relied upon water is not received the purposes of the Groundwater Management Act will be thwarted.

The State of Arizona was acutely concerned with the manner in which the Secretary would allocate the Central Arizona Project water within the State. Concern centered around what allocations would be made to municipal and industrial uses, what allocations would be made for agricultural uses, what priorities, if any, would be given to each of

the users within those categories, and of course what amounts would be given to individual applicants for the use of the water. The Secretary of the Interior requested that Arizona recommend allocations of Central Arizona Project within the State of Arizona (TR. 2708 through 2710). Relying upon the 1964 decreed amounts, Arizona determined the amount of water which it could expect to receive through the Central Arizona Project and developed its allocation recommendations on how those resources should be allocated among applicants for over five times the available supply. Interested parties appeared at various public hearings held throughout the State and presented their views concerning the recommended allocations. Studies by the Arizona Water Commission staff resulting in staff recommended distributions, and the testimony of witnesses at public hearings relied upon the 1964 decreed amounts. Thereafter, Arizona did recommend to the Secretary of the Interior how it wished the water to be allocated.

Arizona not only relied upon the decreed amounts for the above indicated purposes but also relied upon those amounts in its efforts with the Secretary of Interior to determine what amounts the Secretary would require to be delivered through the Central Arizona Project to twelve Indian tribes in the central portions of Arizona. Whatever amount of water would be delivered to those twelve tribes would be deducted from Arizona's remaining entitlement and impact on deliveries to non-Indian users. Arizona fully relied upon the 1964 decree in order to present its views to the Secretary respecting the amounts to be delivered to the twelve tribes in Central Arizona. By Secretarial order, the Secretary allocated a total of 309,810 acre feet annually through the Central Arizona Project to the Indian tribes in the central portions of this State (TR. 2014). Not only Arizona but the United States and the twelve tribes of Central Arizona found themselves relying upon the amount of Arizona's remaining entitlement for purposes of these negotiations. If the decree is now upset and additional water is awarded to the five tribes seeking additional water in

this litigation, the entire basis for negotiations relative to amounts to be delivered to particular central Arizona tribes is without foundation.

The additional amounts of water recommended by Special Master Tuttle to be decreed to the five Indian tribes along the Colorado River will significantly impact the supply of water available to the Central Arizona Project. As development occurs in the Upper Colorado River Basin, pursuant to provisions of the Colorado River Compact, the Upper Basin will put to use more of its entitlement, and the supply available to the Lower Basin will decrease and the severity of water shortages for Central Arizona Project water users in drought years will increase. The water to be delivered through the Central Arizona Project has the lowest priority among Colorado River water users in the State. Therefore, as shortages occur they will first impact on the Central Arizona Project.

Arizona's water experts have determined that the firm supply of water to be delivered through the Central Arizona Project in the later years of the project repayment period will be 550,000 acre feet per annum. Most of the 309,810 acre feet allocated to Central Arizona Indian tribes enjoys a priority equal to non-Indian municipal and industrial uses, although it will be used by Central Arizona Indian tribes for agricultural purposes. All water decreed to the five tribes now seeking additional water rights will impact immediately upon non-Indian agricultural users of Central Arizona Project water and at such times as deliveries fall below 949,810 acre feet there will be a direct impact upon the twelve Indian tribes and non-Indian municipal and industrial users within the central portions of the State.

Arizona also affirmatively presented evidence that the five tribes in question are in a rather favorable position when compared to other Indian and non-Indian users in the state. State Party Exhibits 31 through 38, presented during the testimony of Mr. Steiner, illustrate this enviable position. For instance, Exhibits 31 and 32 compare the present

dependable supply of these five reservations to the current actual supplies and recommended allocations of Colorado River supplies to other users. This comparison shows that the Colorado River Tribe has a present dependable supply of 350 acre feet per capita per annum, while the rest of the State has 1.34 acre feet per capita per annum. Similar figures for Fort Mohave are 298 acre feet per capita per annum, Cocopah 5.90 acre feet per capita per annum. The other tribe in this litigation seeking water rights which would impact against Arizona's entitlement is Fort Yuma. No figures were presented with respect to that reservation in that it had no lands located within the State of Arizona until a boundary claim came into existence by Secretarial Order in 1978. It had no decreed rights in the 1964 decree for lands located in the State of Arizona.

Arizona submits that it has placed great reliance upon the efforts of Special Master Rifkin and this Court. To upset those efforts now would severely act to the detriment of Arizona. Arizona feels the following language from *United States v. Truckee-Carson, supra*, is equally applicable to the current proceedings:

> There was adversity between the plaintiff and the defendant, all concerned perceived that adversity, and it could justly be supposed that the parties would assert all their claims and defenses. The resulting decree was drafted in broad terms, and the Orr Ditch parties were barred from relitigating in any way the claims determined. *Id.*, 649 F.2d at 1309.

Arizona finds no discernable difference between the inquiry concerning "detrimental reliance" and that of "detrimental impact" as the Master intimates at page 38 of his report. He states that detrimental impact cannot be seriously denied. Then he seems to indicate that there is a difference between detrimental reliance and that of detrimental impact. If there was no impact from the reliance there could be no detriment. Therefore, not "impact" or "reliance" but "detriment" is of primary concern. Arizona

has vividly demonstrated this detriment and affirmatively asserts that this Court should compel all parties to be bound by the 1964 Decree in this matter.

MODERATE LIVING

EXCEPTION:

Arizona excepts to the Master's refusal to allow presentation of evidence of what would constitute a "moderate living" for the five Tribes, and to reopen the 1964 decree in its entirety to apply more recent judicial refinements of the reserved rights doctrine and examine the "practicably irrigable" standard of establishing Indian water rights.

PROPOSED FINDING:

Pursuant to the case of *State of Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979), evidence relating to what constitutes a "moderate living" is admissible to ascertain the reasonable livelihood needs of the Indians and thus ascertain the minimum allocation of Colorado River water the Indians could receive and maintain a "moderate living."

PROPOSED ACTION:

If the Court concludes the 1964 decree is not binding on the parties then in a reopening of that decree all relevant issues should be examined and the Court should remand in total for a redetermination of the Indian 1964 decreed rights.

ARGUMENT

During the proceedings before Special Master Tuttle, and before the taking of any evidence, this Court decided the *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979). Pursuant to that case the State Parties filed a motion with Special Master Tuttle requesting that they be allowed to litigate the question of how much water would be needed to provide Indians with a "moderate living." This motion was filed in September, 1980.

After the decision was handed down by this Court, the State Parties began to undertake discovery related to such issues as, (1) the number of Indians residing on each of the five reservations, (2) the number of acres of land farmed by the tribes or by individual Indians, (3) the number of acres leased to others to farm, (4) the amount of money received for leasing lands to others to farm, and (5) other related issued pertaining to the tribes or individual Indian income. With the evidence to be obtained from this discovery the State Parties intended to present to the Special Master evidence showing the income produced on each reservation and per capita income on each reservation. It was the intent of the State Parties to follow such evidence with evidence pertaining to the requirements for a moderate living by showing national figures pertaining to a family of four, state figures pertaining to a family of four, or such other size families on which figures existed. It was also the intent of the State Parties to prove the cost of living in the areas of the reservations in the State of Arizona, State of Nevada and State of California.

In attempts to obtain such evidence the State Parties had indeed conversed with both the United States and Representatives of various of the tribes to arrange dates to visit the reservations to obtain Tribal and Bureau of Indian Affairs information to compile proof of the kind described. As these efforts were progressing a pretrial hearing was held in Atlanta, Georgia by Special Master Tuttle on July 10, 1980. At that pretrial hearing the motion to allow the States to present evidence concerning what constituted a "moderate living" was presented and Special Master Tuttle ruled that he would not hear such evidence and that he would not consider this issue. The State Parties requested and were allowed the opportunity to file with Special Master Tuttle a memorandum in the nature of an offer of proof, which memorandum was prepared from information then available to the State Parties. (Appendix A.) However, following this ruling the tribes refused to allow the State Parties to come to the reservations and obtain information

of the nature that was being sought. Consequently, the offer of proof was not as detailed or thorough as the State Parties would have hoped to make it. Nevertheless, it is requested that this Court consider that offer of proof as though set forth fully herein.

A lengthy discussion of the *Washington Commercial Fishing Vessel Association* case is probably not needed. The holding of that case would seem, without question, to apply to these proceedings. This Court cited *Arizona v. California*, 373 U.S. 564 (1963), and *Winters v. United States*, 207 U.S. 564 (1908), as support for the proposition that in cases involving scarce natural resources, and after a determination that the resource involved was necessary for the Indian Welfare, "... the court typically ordered a *trial judge or special master* in his discretion, to devise some apportionment that assured that the Indians *reasonable livelihood needs* would be met." *Washington v. Fishing Vessel Ass'n., supra*, 443 U.S. at 685. (Emphasis supplied.)

No reasonable argument can be made that water is not one of the most precious, and at the same time one of the most scarce natural resources of the area of the southwest served by the Colorado River. With this in mind the principles and teachings of the *Washington State Commercial Fishing Vessels Association* case are of utmost importance in the determination of so-called "Winters Rights" or "Reserved Rights" for Indians. No longer can any one group of people insist upon the right to use water in this area without consideration of the needs and rights of others. Therefore, as this Court instructed it was appropriate that the Special Master hear evidence about and decide the issue of the requirements of Indians to provide them with a moderate livelihood.

As this Court so succinctly stated: "This is precisely what the District Court did here, except that it realized that some *ceiling* should be placed on the Indians apportionment to prevent their needs from exhausting the entire resource and thereby frustrating the treaty rights of 'all other citizens of the territory.' " *Id.*, 443 U.S. at 686.

Recognizing that the treaty imposed a 50% ceiling on the Indian fishing rights, the Court, nevertheless, recognized that the ceiling imposed a maximum but not a minimum allocation. Referring to the decision in this litigation this Court stated:

> As in Arizona v. California and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living. *Id.*, 443 U.S. at 686. (Emphasis supplied.)

The ruling by Special Master Tuttle abruptly halted all discovery pertaining to the issue of a "moderate living" for the Indians. It is submitted that that ruling was in error and that these proceedings should have included the presentation of such evidence as is relevant to the establishment of what amount of water is required to provide the Indians with "... so much as, but not more than, ..." the amount of a very scarce natural resource as is necessary for a "moderate living." Having precluded this issue from being presented Special Master Tuttle ignored this court's ruling and erred to the prejudice of the State Parties.

Arizona urges the reopening of the 1964 decree entirely if it is not binding as to all parties. The bases for such a request are several. In addition to *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra,* this Court also decided *United States v. New Mexico,* 438 U.S. 96 (1978), since the 1964 decree. These subsequent refinements of the reserved rights doc-

trine justify a reopening, if indeed the decree can be reopened as claimed by the United States and the Tribes, to examine several aspects of the prior case. Among those are the following:

(1) The purpose and scope of the reservations should be read narrowly, focusing on the principal and secondary purposes of the reservations.

(2) The leasing of lands and water rights to non-Indians for development on the reservation beyond the "reasonable needs" of the Tribe itself is not a "primary" purpose of the reservation.

(3) The proper measure of the "reasonable needs" of a Tribe is not the *maximum* amount of irrigable acreage on the reservation, but is the *minimum* amount necessary to provide the Tribe a "reasonable livelihood".

(4) The determination of the water rights for the Colorado River Indian Reservation, the largest of the five mainstream reservations, must take into account that it was set aside for a number of tribes who refused to settle there and were later relocated to several of the other mainstream reservations, so that the determination of the measure of the rights of the five reservations involved a significant "double dip" into the available water supply based on double acreage for tribes who never settled on the Colorado River Indian Reservation.

(5) A comprehensive evidentiary hearing should be undertaken on whether the "practicably irrigable acreage" standard was indeed a proper measure to apply especially in the State of Arizona. For instance in Arizona water is so scarce that the application of this standard on all Indian reservations in this state

would satisfy only one-third of the Indian demands, and none of the demands for non-Indians. From a purely practical point of view, is this standard workable?

If Article IX is to be read so broadly as to allow modifications of the nature sought by the Indians and the United States, then it likewise permits reopening to pursue the matters raised in this section of this brief.

TECHNOLOGICAL CHANGES

EXCEPTION:

Arizona excepts to the Master's refusal to apply technology as of the time the reservations were created for purposes of determining what water rights were impliedly reserved for the tribes.

PROPOSED FINDING:

For the purpose of ascertaining the implied intent as to how much water is reserved for use on an Indian reservation, the technology at the time the reservation is created is to be applied.

PROPOSED ACTION:

If the Court determines the parties are not bound by the 1964 decree as to lands within the reservations at the time of the decree then the matter should be remanded to receive evidence as to what irrigation and related technology existed at the time of the creation of each reservation to determine what amount of water was impliedly reserved when the reservation was created.

ARGUMENT

The so-called "Winters Doctrine" or "Reserved Rights Doctrine" is based upon the concept that where an Indian reservation is created and nothing is said in the documentation creating that reservation pertaining to water rights, nevertheless, it must have been implied by the legislative or executive authority that water rights would be reserved for the tribal lands. See *Winters v. United States, supra.* Thus, the court established that such an approach would be nec-

essary in order to make the land useful. The court by implication provided the required intent in place of silence on that issue. The question to be determined at this time is whether or not the court will further provide, in place of silence, an intent that Congress, the President, or such other executive who establishes an Indian reservation also by implication intended that water rights pertaining thereto should increase with technological advances. This issue becomes of importance in view of the fact that large acreages of the Indian reservations in question are found by Special Master Tuttle to be practicably irrigable on the basis that the new techniques of "drip irrigation" and "sprinkler irrigation" allow for profitable irrigation of lands that could not be irrigable under prior technology.

Claims in this case were that the rate of application of water could be so controlled as to allow the irrigation of sandy soils frequently enough to avoid the moisture content becoming so low as to be critical to plant life. It was further claimed that lands that could not be irrigated before because of excessive contour or slope problems can now be irrigated by side roll or center pivot sprinklers or drip irrigation.

The key question in this issue is whether or not the judiciary can, or should attempt to ascribe to the minds of legislators or executive officials who are acting in the late 1800's wisdom and foresight to know that irrigation technology existing 100 years later would alter irrigation techniques so as to allow the irrigation of lands which were not considered irrigable at the time the reservations were created. No doubt reasonable minds could conclude that technological advances would occur. However, gross speculation is necessary to ascribe to the minds of the late 1800's the vision to know what would occur in the 1970's and early 1980's.

A more reasonable approach, the State Parties submit, would be to conclude that those persons establishing a home for Indians considered and decided what amount of lands would be appropriate to set aside for their use. If later events proved them to be erroneous then additional lands could be added to that reservation by others who were familiar with the conditions existing at that later time. Those lands then could receive a reserved right as of that time. It would be stretching implication far beyond reason to conclude that any increased Indian needs be met by technological changes. No one could know or even reasonably foresee what technological changes would occur in the future. However, it is well within reason to conclude that if Indian needs increased additional lands could be set aside and appropriate water rights reserved to meet those needs.

Special Master Tuttle received from the State Parties a memorandum in the nature of an offer of proof on this issue. (See appendix B)

With respect to the reservations in question there are later additions of land to some of the reservations. Those additions to the reservations have sought, and received, a recommendation of Special Master Tuttle for water. (The question of title to these lands is addressed by the Metropolitan Water District brief and the State Parties joint brief.) This method of meeting any increase in Indian need allows the decision maker to have the ability to obtain all known facts and act upon those facts. This method is much superior to the approach which would at best be a guesstimate of what was in the mind of the decision maker as to technological advances at some unknown time in the future.

It must also be pointed out that an approach which allows an increase in water rights based on technological advances would forever prevent the certainty that was sought by both Special Master Rifkin and this Court as to all water rights considered in the prior trial so as to allow all users thereafter to know what rights they had and allow them to finance irrigation systems and municipal systems

for the use of that water. If Indian water rights can be increased each time a technological advance occurs such finality will never occur.

CONCLUSION

This Court should preclude a relitigation of so-called "omitted lands" and order the 1963 decision and 1964 decree binding on the Parties. If the Court concludes the decree to be completely open-ended then the issues presented by Arizona and the State Parties should be tried in any reopening. Boundary questions must be finalized in an appropriate proceeding before additional water rights are assigned to "boundary lands" and this Court should enter appropriate orders relating to the boundary questions.

STATE OF ARIZONA

By _____

RALPH E. HUNSAKER
Special Attorney for the
Department of Water Resources

AFFIDAVIT OF SERVICE

RALPH E. HUNSAKER, being first duly sworn, deposes and says:

That he has made service of the foregoing brief by causing to be mailed the original and fifty-nine copies to:

Clerk
Supreme Court of the United States
Washington, D.C. 20543

and has caused to be mailed three copies of said brief to each of the following:

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MR. DANIEL H. ISRAEL, Dechert, Price & Rhoads, 717 17th Street, Suite 1760, Denver, Colorado, 80202.

For the Cocopah and Chemehuevi Indian Tribes:
MR. LAWRENCE A. ASCHENBRENNER, 1712 N Street, NW, Washington, D.C., 20036.

For the State of Nevada:
ATTORNEY GENERAL RICHARD BRYAN by MR. JAMES V. LAVELLE, Deputy Attorney General, 4220 Maryland Parkway, Las Vegas, Nevada 89019.

DATED at Phoenix, Arizona, this _____ day of May, 1982.

_____
RALPH E. HUNSAKER

SUBSCRIBED AND SWORN to before me this _____ day of May, 1982.

_____
Notary Public

My Commission Expires:

_____

SUPREME COURT OF THE UNITED STATES
BEFORE THE SPECIAL MASTER

OCTOBER TERM, 1979
NO. 8, ORIGINAL

STATE OF ARIZONA,
COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,
DEFENDANTS,

UNITED STATES OF AMERICA and STATE OF NEVADA,
INTERVENERS,

STATE OF NEW MEXICO and STATE OF UTAH,
IMPLEADED DEFENDANTS.

STATE PARTIES OFFER OF PROOF RE REASONABLE LIVELIHOOD "MODERATE LIVING"

APPENDIX A

OFFER OF PROOF RE REASONABLE LIVELIHOOD "MODERATE LIVING"

On July 2, 1979, the United States Supreme Court decided the case of *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 61 L.Ed. 2d 823 (1979). This case cited among other cases *Arizona v. California*, 373 U.S. 546, 10 L.Ed. 2d 542 (1963). In the *Washington* fishing case, the United States Supreme Court indicated as follows:

> As in *Arizona v. California* and its predecessor cases, the central principal here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood - that is to say, a moderate living. 443 U.S. at 61 L.Ed. 2d at 846.

The United States and the Indians in this case claim as authority for reopening the 1964 Decree, Article IX and Article II(d)(5). If these articles are legally valid as a basis for reopening of the decree, it is required that the Master look into all aspects of the claims for additional water, including that of what amount of water is necessary to provide the Indians with a "moderate living."

The Master has ruled as of July 10, 1980, that this issue will not be allowed. This ruling has resulted in the United States and the Indians failing to answer interrogatories and requests for production, and terminating agreements that the State parties could come to the reservations and review leases and other documentation relative to Indian income. Agreements that the State parties could come to the reservation had been arrived at and negotiations were occurring at the time of the Master's ruling to arrange times and places for the State parties to go to the reservations and review the necessary documentation and evidence.

With respect to the Indian reservations in question, it would be the proof of the State parties that in the previous litigation the reservation populations were stated and the Special Master would be requested to take judicial notice thereof. On the Fort Mohave Reservation, the population of the Tribe was approximately 450. On the Chemehuevi Reservation the population was approximately 300. On the Colorado River Reservation the population was approximately 1300. On the Fort Yuma Reservation the population was approximately 1200 and the Cocopah Reservation population was approximately 90.

The States, if allowed to do so, would also present evidence that the Arizona statistical review prepared by the Valley National Bank for 1979 shows the population of the Cocopah Reservation is 465. The Colorado River Reservation population is 2,019 and Fort Mohave is 412. The statistical review shows no population on the portion of the Fort Yuma Indian Reservation that is in Arizona, because until the December 20, 1978, Secretarial Order and Solicitor Opinion, none of the lands for which water is now sought in Arizona were considered as Indian lands.

The States would further present proof through the Tribal Chairman or other witnesses from the Tribes and the Bureau of Indian Affairs and through answers to interrogatories or request for production and documentation which would be received from the various Tribes regarding leases of Indian land to non-Indian farmers. The States would also show the amount of income to Indians through farming of land by either tribal farms or individual Indian farmers on the reservation, or through leases to non-Indian farmers.

In the case of the Fort Yuma Indian Reservation, the gentleman who toured with the various witnesses on behalf of the State and lawyers on behalf of the States when the Fort Yuma Indian Reservation was visited, a Mr. _____, indicated that the lands being leased on the Fort Yuma Indian Reservations to non-Indian farmers were being

leased for $200 an acre. Based upon a lease of $200 an acre and with decreed water rights in 1964 of 7,743 acres, annual receipts of $1,548,600 would be received by the Tribe. An annual income of $12,905 for every man, woman and child on the reservation would be received, and for a family of four that would mean an annual income of $51,620.

Using the decreed water right figures for the other reservations together with the populations used at the previous trial, and assuming a $200 an acre rental incomes for the other reservations, annual incomes for every man, woman and child for the other reservations can likewise be computed. For the Chemehuevi Reservation with 1900 acres being considered irrigable by the previous decree, every man, woman and child would have an annual income of $12,666 or $50,664 for a family of four.

On the Colorado River Indian Reservation with 107,588 acres, an annual income of $21,517,600 could be realized at $200 an acre, and with the Tribal population of 1,300 this would mean $16,552 per individual or for a family of four $66,208.

The States would also present through answers to the interrogatories and request for production those documents and witnesses to testify as to how much of the reservations are currently leased. In the case of the Colorado River Indian Reservation, the report of Boyle Engineering shows at page 10 that in 1978, 81,000 gross acres were irrigated on the reservation, 2,500 acres were farmed as a unit by the Tribe, 14,000 acres are farmed under leases to individual members of the Tribe and 65,000 acres are under long-term agricultural leases to several private growers. That totals 81,500 acres and if a value of $200 an acre for leases is ascribed to that land, gross revenues of $16,300,000 would be realized or $12,538 per individual and $50,152 for a family of four.

The States would present testimony from various government documents as to the cost of living for an individual or a family of four or other representative family. Attached hereto and made a part hereof by this reference are Exhibits "A" and "B". Exhibit "A" is poverty guidelines published in the Federal Register, volume 45 No. 78 for the continental United States in 1980. Exhibit "B" is a table from the Arizona Statistical Review that presents the budget for an urban family for maintaining an intermediate standard of living for the metro-Phoenix area and U.S. urban average.

The State parties have been precluded from pursuing the appropriate discovery methods in this matter by reason of the ruling of the Special Master in July 1980. At the time of the ruling, the States were in the process of working out the details of when and where they could go to the reservations to review the documentation as to Indian income, and would if allowed to pursue this discovery, present documentation of a nature to prove the Indian income on an individual basis, or a tribal basis, or whatever other basis the documentation would show, to indicate to the Court the income of the Indians. From that, a determination could be made as to whether or not any additional water is needed by the Indians to provide them with a moderate living, or in fact, whether or not the amounts in the 1964 Decree should be treated as maximum amounts as stated by the United States Supreme Court in the *Washington, supra,* and in fact, the Indians require less water than decreed in order to provide themselves with a moderate living.

The Master should particularly hear this issue in that an opening of the case should allow reopening for all purposes and as instructed in the *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, supra,* the Master has an obligation to determine an apportionment to meet reasonable livelihood needs of the Indians. The United States Supreme Court stated:

> In those cases, after determining at the time of the treaties the resource involved was necessary to the Indian's welfare, the Court typically ordered a trial judge or special master, in his discretion, to devise some apportionment that asserted that the Indians' reasonable livelihood needs would be met. 443 U.S. at ____, 61 L.Ed. 2d at 845.

The Master may not shirk that responsibility.

The States are prepared to show that after almost 17 years since the initial decision in this case, the Indians still have not fully developed their reservations. A fact which could well bear upon their need for any additional water, or indeed the need for the amounts of water decreed in 1964, for purposes of providing them with a "moderate living."

Dated this ____ day of September, 1980.

RESPECTFULLY SUBMITTED,

STATE OF ARIZONA

By _____
Ralph Hunsaker
Chief Counsel for the Arizona
Water Commission

Copies of the foregoing
delivered this ____ day
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April 21, 1980
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Vol. 45 No. 79
Pages 26685-26942

EXHIBIT "A"

federal register

Highlights

26685 **Transactions with Iran** Executive Order

26940 **Iranian Assets Control** Treasury/Office of Foreign Assets issues regulations imposing additional prohibitions on dealings with Iran; effective 4-17-80 (Part VIII of this issue)

26934 **Womens' Business Enterprise Policy** EPA gives notice of intent to issue guidance concerning EPA's construction grants program (Part VII of this issue)

26705 **Education** HEW issues regulations revising sections of the fund for the improvement of postsecondary education regulations

26914 **National Diffusion Network Program** HEW/OE issues regulations governing the award of grants to public and private nonprofit agencies (Part V of this issue)

26749 **Technical Assistance and Energy Conservation Measures** DOE/SOLAR gives notice of closing date of second grant program cycle; apply by 9-30-80

26717 **Technical Assistance and Energy Conservation Measures** DOE/SOLAR publishes notice to solicit public comment concerning possible amendments to the present regulations for use in future grant program cycles; comments by 5-30-80

CONTINUED INSIDE

Discussion

In consideration of the foregoing, Part 56 of Title 46 of the Code of Federal Regulations is amended by revising § 56.50-85(a)(5) to read as follows:

§ 56.50-85 Tank vent piping.

(a) * * *

(5) Vents from fuel oil and other tanks extending above the freeboard or superstructure deck shall be of substantial construction. Except for barges in inland service and on Great Lakes vessels, the height from the deck to any point where water may gain access below deck shall be at least 30 inches on the freeboard deck, and 18 inches on the superstructure deck. On Great Lakes vessels, the height from the deck to any point where water may gain access below deck, shall be at least 30 inches on the freeboard deck, 24 inches on the raised quarterdeck, and 12 inches above other superstructure decks. Where height of vent pipes on Great Lakes vessels may interfere with the working of the vessel a lower height may be approved provided the vent cap is properly protected. Barges in inland service need provide a height of not less than 6 inches. A lesser amount may be approved if evidence is provided to the Commandant that a particular vent has proven satisfactory in service.

* * * * *

(R.S. 4405, as amended (46 U.S.C. 375); R.S. 4417, as amended (46 U.S.C. 391); 49 Stat. 1889 as amended (46 U.S.C. 391a); R.S. 4462 as amended (46 U.S.C. 416).)

Dated: April 16, 1980.

W. D. Markle, Jr.,

Captain, U.S. Coast Guard, Acting Chief, Office of Merchant Marine Safety.

[FR Doc. 80-12138 Filed 4-18-80; 8:45 am]

BILLING CODE 4910-14-M

COMMUNITY SERVICES ADMINISTRATION

45 CFR Part 1060

General Characteristics of Community Action Programs; Income Poverty Guidelines (Revised)

AGENCY: Community Services Administration.

ACTION: Final rule.

SUMMARY: The Community Services Administration is revising its income poverty guidelines. The Economic Opportunity Act of 1964, as amended, requires yearly revisions of the poverty guidelines for use by every agency administering programs under the Act in which the poverty guidelines are used to judge eligibility for participating in programs. These annual revisions assure that the income guidelines reflect the changes in the cost of living.

EFFECTIVE DATE: This rule is effective April 21, 1980.

FOR FURTHER INFORMATION CONTACT: Ms. Mary R. Ellyn, Policy, Planning and Analysis Division, Community Services Administration, Office of Policy, Planning and Evaluation, 1200 19th Street, N.W., Washington, D.C. 20506. Telephone: (202) 632-6630. Teletypewriter: (202) 254-6218.

SUPPLEMENTARY INFORMATION: The Community Services Administration revision of the updated poverty guidelines constitutes compliance with the legislatively mandated requirement of Section 624 of the Economic Opportunity Act of 1964, as amended. This revision is not significant according to Executive Order 12044 since the only change being made reflects the changes in the Consumer Price Index and is required by the previously mentioned Section of the EOA. The text defining "Income" and "A Farm Residence" remains unchanged. The policy regarding use of these guidelines is also unchanged by this revision.

This amendment to § 1060.2 revises the guidelines previously published in §§ 1060.2-1 and 1060.2-2.

Authority: The provisions of this subpart are issued under Section 602, 78 Stat. 530, 42 U.S.C. 2942.

William W. Allison,

Acting Director.

45 CFR 1060.2-1 through 1060.2-2 is revised to read as follows:

§ 1060.2-1 Applicability.

This subpart applies to all grants financially assisted under Titles II, IV and VII of the Economic Opportunity Act of 1964, as amended, if such assist is administered by the Community Services Administration.

§ 1060.2-2 Policy.

(a) The attached income guidelines are to be used for all those CSA funded programs, whether administered by a grantee or delegate agency, which use CSA poverty income guidelines as admission standards. These guidelines do not supersede alternative standards of eligibility approved by CSA.

(b) The guidelines are also to be used in certain other instances where required by CSA as a definition of poverty, e.g., for purposes of data collection and for defining eligibility for allowances and reimbursements to board members. Agencies may wish to use these guidelines for other administrative and statistical purposes as appropriate.

(c) The attached guidelines are based upon Table 17 of the U.S. Bureau of the Census, *Current Population Reports*, Series P–60, No. 120, "Money Income and Poverty Status of Families and Persons in the United States: 1978" (Advance Report), U.S. Government Printing Office, Washington, D.C., November 1979; and Department of Labor Press Release USDL–80–46 of December 1979.

(d) The following definitions, from *"Current Population Reports,"* P–60, No. 91, Bureau of the Census, December 1973 have been adopted by CSA for use with the attached poverty guidelines.

(1) *Income.* Refers to total cash receipts before taxes from all sources. These include money wages and salaries before any deductions, but not including food or rent in lieu of wages. They include receipts from self-employment or from own farm or business after deductions for business or farm expenses. They include regular payments from public assistance, social security, unemployment and workman's compensation, strike benefits from union funds, veteran's benefits, training stipends, alimony, child support and military family allotments or other regular support from an absent family member or someone not living in the household; government employee pensions, private pensions and regular insurance or annuity payments; and income from dividends, interest, rents, royalties or income from estates and trusts. For eligibility purposes, income does not refer to the following money receipts: any assets drawn down as withdrawals from a bank, sale of property, house or car, tax refunds, gifts, one-time insurance payments or compensation for injury; also to be disregarded is non-cash income, such as the bonus value of food and fuel produced and consumed on farms and the imputed value of rent from owner-occupied farm or non-farm housing.

(2) *A Farm Residence.* Is defined as any dwelling on a place of 10 acres or more with $50 or more annual sales of farm products raised there; or any place less than 10 acres having product sales of $250 or more.

Attachment.—1980 Community Services Administration Poverty Income Guidelines for all States Except Alaska and Hawaii

Size of family unit	Nonfarm family	Farm family
1	$3,790	$3,250
2	5,010	4,290
3	6,230	5,310
4	7,450	6,340
5	8,670	7,370
6	9,890	8,400

For family units with more than 6 members, add $1,220 for each additional member in a nonfarm family and $1,030 for each additional member in a farm family.

Poverty Guidelines for Alaska

Size of family unit	Nonfarm family	Farm family
1	$4,780	$4,090
2	6,290	5,370
3	7,800	6,650
4	9,320	7,930
5	10,840	9,210
6	12,360	10,490

For family units with more than 6 members, add $1,520 for each additional member in a nonfarm family and $1,280 for each additional member in a farm family.

Poverty Guidelines for Hawaii

Size of family unit	Nonfarm family	Farm family
1	$4,370	$3,780
2	5,770	4,940
3	7,170	6,120
4	8,570	7,300
5	9,970	8,480
6	11,370	9,660

For family units with more than 6 members, add $1,400 for each additional member in a nonfarm family and $1,180 for each additional member in a farm family.

[FR Doc. 80-12204 Filed 4-18-80; 8:45 am]

BILLING CODE 6315-01-M

1978 URBAN FAMILY BUDGET
FOR MAINTAINING AN INTERMEDIATE LIVING STANDARD

Item	Metropolitan Phoenix		Metropolitan Tucson		U.S. Urban Average	
	Budget	% of Total	Budget	% of Total	Budget	% of Total
FAMILY CONSUMPTION	$15,085	76.4%	$14,736	76.5%	$14,000	75.2%
Food	4,842	24.5	4,407	22.8	4,609	24.8
Housing	4,722	23.9	4,853	25.2	4,182	22.5
Transportation	1,880	9.5	1,740	9.1	1,572	8.4
Clothing & Personal Care	1,751	8.9	1,805	9.4	1,612	8.7
Medical Care	1,039	5.3	1,025	5.3	1,070	5.7
Other Consumption	851	4.3	906	4.7	956	5.1
OTHER COSTS*	766	3.9	750	3.9	810	4.3
TAXES	3,884	19.7	3,784	19.6	3,811	20.5
Social Security & Disability	1,071	5.4	1,071	5.5	1,075	5.8
Personal Income	2,813	14.3	2,713	14.1	2,738	14.7
TOTAL BUDGET	$19,735	100.0%	$19,269	100.0%	$18,622	100.0%

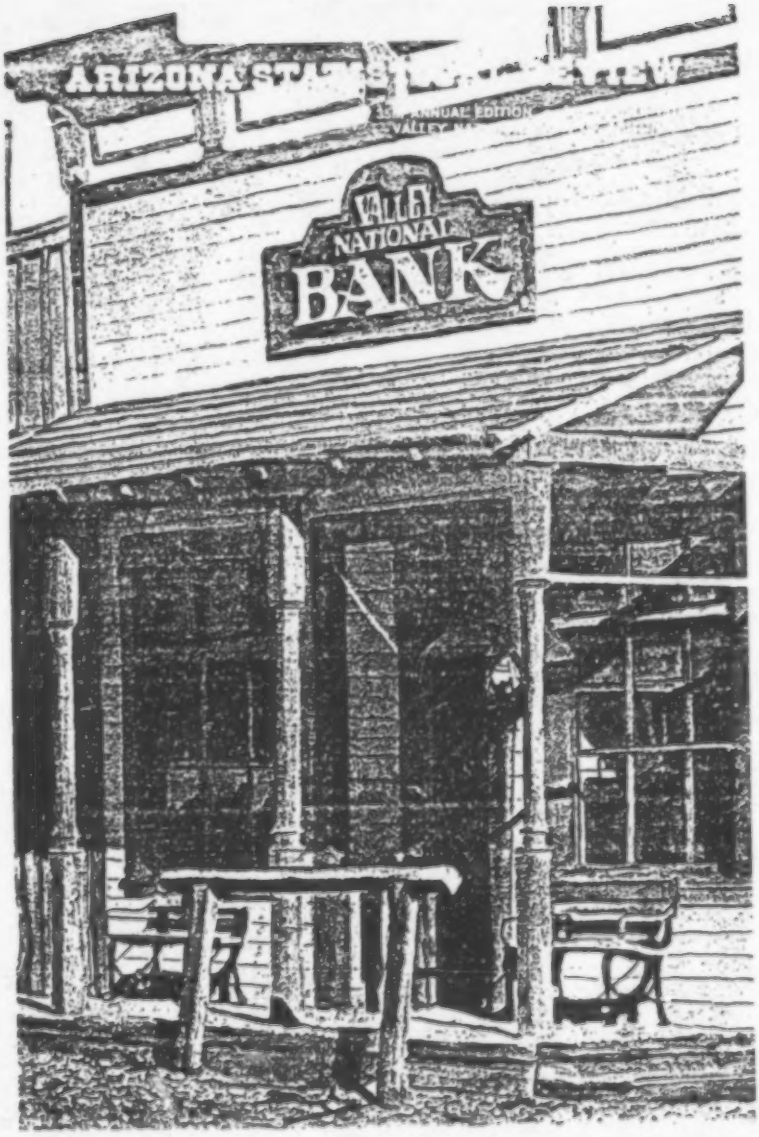
*Other Costs include gifts and contributions, personal life insurance, and occupational expenses.
Note: Columns may not add to totals due to rounding.

1978 URBAN FAMILY BUDGET
COMPARISONS FOR SELECTED U.S. CITIES

Rank	Metropolitan Area	Autumn 1978 Budget	Rank	Metropolitan Area	Autumn 1978 Budget
1.	Dallas	$16,714	13.	Cleveland	$18,987
2.	Atlanta	16,897	14.	Detroit	19,145
3.	Houston	17,114	15.	TUCSON	19,269
4.	San Diego	17,707	16.	Minneapolis-St. Paul	19,389
5.	Los Angeles-Long Beach	17,722	17.	Philadelphia	19,416
6.	St. Louis	17,897	18.	San Francisco-Oakland	19,427
7.	Pittsburgh	18,008	19.	Buffalo	19,517
8.	Kansas City	18,262	20.	PHOENIX	19,735
9.	Cincinnati	18,354	21.	Milwaukee	20,025
—	U.S. AVERAGE	18,622	22.	Washington, D.C.	20,105
10.	Seattle	18,671	23.	New York-N.J.	21,587
11.	Baltimore	18,699	24.	Boston	22,117
12.	Chicago	18,794	25.	Honolulu	23,099

Source: U.S. figures and all cities except Phoenix and Tucson by U.S. Department of Labor, Bureau of Labor Statistics. Phoenix data by Bureau of Business and Economic Research, Arizona State University, in cooperative cosponsorship with Valley National Bank. Tucson data by Division of Economic and Business Research, University of Arizona, in cooperative cosponsorship with Valley National Bank.

EXHIBIT "B"



SUPREME COURT OF THE UNITED STATES
BEFORE THE SPECIAL MASTER

OCTOBER TERM, 1979
NO. 8, ORIGINAL

STATE OF ARIZONA,
COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,
DEFENDANTS,

UNITED STATES OF AMERICA and STATE OF NEVADA,
INTERVENERS,

STATE OF NEW MEXICO and STATE OF UTAH,
IMPLEADED DEFENDANTS.

STATE PARTIES OFFER OF PROOF RE TECHNOLOGY AT THE TIME THE RESERVATION ARE CREATED

APPENDIX B

The States offer into evidence upon the question of the technology of the state-of-the-art of irrigation at the time the Indian reservations were created in this case, Chapter 6 of the Bookman-Edmonston Report. This chapter deals with the question of the technology at the time the reservations in this matter were created and indicate the ability or lack of ability to irrigate certain lands at the time. If allowed to pursue the matter, the States would present Chapter 6 of the Report of Bookman-Edmonston and also through the witnesses listed on behalf of Bookman-Edmonston would present to the Special Master testimony to support the claim that irrigation on Indian reservations would have been limited by technology existing at the time the reservations were created.

The ruling of the Master on July 10, 1980, precludes the States from presenting such testimony. This testimony is material on the issue of how much water Congress or the Executive impliedly intended to reserve for use on the reservations. Neither the Congress nor the Executive in creating the reservation could have intended either expressly or impliedly, to reserve the quantity of water required by some future but unknown technology of irrigation. It must be inferred, then, that the Congress and/or the Executive who created the reservation in question, could only have intended that the water to be put to use would be put to use by then known means. To do otherwise would be to leave open-ended the magnitude of the water reservation and to leave in doubt the water rights of all other developments and uses, including those reservations established subsequently. Any limiting features of the ability to use the water should necessarily be included in the implied intent at the time of the creation of the reservation. The evidence presented in Chapter 6 of the Bookman-Edmonston Report prepared on behalf of the State Parties is material to the

issue of technology as it existed at the time of the creation of the various reservations and should be received in evidence.

Both the Special Master's report and the 1963 opinions of this Court, which established present allocations, state that a specific reservation of water for Indians was required so as to not leave any potential user of water uncertain about the remaining amounts available. If this were not the case, the financing of other municipal and irrigation projects would be imapired, interest in developing projects would be stifled, and could not be undertaken with any assurance that a water supply would be available until such time as the Indian water rights were quantified and made certain. Therefore, it was imperative in the interest of the future growth that the Indian rights be quantified as of a particular point in time. As Special Master Rifkin stated at page 256 of this report:

> Furthermore, the claims of the United States to water from the Colorado River for the benefit of the Indian reservations are of such great magnitude that failure to adjudicate them would leave a cloud on legal availability of substantial amounts of mainstream water for use by non-Indian projects.

The Special Master went on to state in his analysis of *Winters v. United States*, that:

> The Supreme Court thus held that the reservation of water was effective *as of the date that the Fort Belknap reservation was created.* ... 207 U.S. at 577. (Emphasis supplied).

It should be noted that even Special Master Rifkin then erred in using the technology of the day and not that existing at the time of the creation of the reservation. This whole concept must be resisted if the 1964 Decree is reopened. The imperative requirement of certainty in reserved water rights is endangered by the United States' motion to reopen the 1964 Decree. If at every stage of technological advance the Tribes are permitted to increase their

claim to water, the certainty sought by Special Master Rifkin and the Court in *Arizona v. California* will be thwarted. Financing of irrigation projects will be subject to uncertainty of increased Tribal uses, and lenders will be unwilling to finance the construction of such projects. Likewise, planners in urban areas will be unable to depend upon a certain quantity of water for future needs. These concerns were expressed by Special Master Rifkin, and he rejected the argument that there would be a forever changing right on behalf of the Indians at page 264 of this report:

> However, such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable. Financing of irrigation projects would be severely hampered if investors were faced with the possibility that expanding needs of an Indian reservation might result in a reduction of the project's water supply. Moreover, it would not give the United States any certainty as to the extent of its reserved rights, which would undoubtedly hamper the United States in developing them.

Special Master Rifkin also recognized that one could only look to the intent of Congress at the time of the creation of the reservation in order to quantify the claim.

He stated at page 265 of his report:

> I hold only that the amount of water reserved, and hence, the magnitude of water rights created is determined by agricultural and related requirements, since *when the water was reserved that was the purpose of the reservation.* (Emphasis supplied).

The United States, however, would have the Special Master allow speculation in the evaluation of these reserved rights, by contending that Congress or the Executive intended to reserve in accordance with future conditions they knew nothing about. This approach was rejected in *Arizona*

v. California when it was argued that the quantity of water reserved to the Tribes should be measured by their "reasonably foreseeable needs." The Court said with respect to this argument:

> How many Indians there will be and what their future needs will be can only be guessed. 373 U.S. at 600-601.

The same is true with respect to changing technology. If the acreage was not irrigable under the technology that existed at the time of the creation of the reservation, this Court should not infer guesswork on the part of Congress or those who prepared a treaty, to indicated that if the technology of irrigation were to change, the quantity of water impliedly reserved would also change.

Additional grounds for rejection of the Tribes' position is provided by the doctrine of prior appropriation. Allocation of water in nearly all Western states is based on established usage, in order to provide certainty to all users, present and future, of available supplies. The "reserved rights" doctrine is not based on actual use; therefore, some other basis to provide this ongoing certainty of supply had to be developed. The 1964 Decree established this format, by basing allocations upon an existing set of circumstances not subject to change, unless the level was inadequate to provide the Tribes with a moderate standard of living (see subheading III, supra). The Decree should not be distrubed on this basis, unless the 1964 Decree is revised to recognize technology and conditions when each reservation was created.

The evidence the State Parties seek to present would establish the practicably irrigable acreage on the five reservations in question at the time those reservations were created. In a report prepared for the Arizona Water Commission, the Bookman-Edmonston Engineering Corporation analyzed this question, factoring in knowledge of the tech-

nological state-of-the-art and the physical conditions prevailing at the time each reservation was established. This type of evidence will demonstrate the technology upon which Congress' implied reservation of water was based.

DATED THIS 2nd day of September, 1980.

Respectfully submitted,

STATE OF ARIZONA

By _____
RALPH HUNSAKER

Copies of the foregoing
hand delivered this 2nd day
of September, 1980, to:

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Scott McElroy
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No. 8, Original

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON THE REPORT OF THE SPECIAL MASTER

EXCEPTIONS OF THE UNITED STATES AND SUPPORTING MEMORANDUM

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ON THE REPORT OF THE SPECIAL MASTER

EXCEPTIONS OF THE UNITED STATES

The United States respectfully excepts to the final Report of the Special Master, in the following respects:

First, insofar as the Report recommends disallowance of mainstream diversion rights for the benefit of specified irrigable acreage of the Fort Mojave Indian Reservation on the ground that the lands in question have not finally been determined to lie within the Reservation boundaries;

Second, insofar as the recommended Decree provides for exclusion from entitlement to mainstream diversion rights of parcels within the boundaries of each Reservation which, after the establishment of

the Reservation, have been, or later may be, alienated to non-Indians;

Third, insofar as the recommended Decree fails explicitly to recognize the continuing force, as applied to all acreage to be awarded diversion rights, of the priority and unrestricted use provisions of the Decree entered by this Court on January 9, 1979; and,

Fourth, insofar as the recommended Decree fails to allocate among the three Lower Basin States the mainstream diversion rights recognized in favor of the five Indian Reservations.

REX E. LEE
Solicitor General

MAY 1982

TABLE OF CONTENTS

	Page
Statement	1
Argument	4
First Exception: Boundary lands in the "Checkerboard Area" of the Fort Mojave Indian Reservation disallowed as not finally determined to be within the Reservation	5
Second Exception: Future exclusion from entitlement to diversion rights of Reservation lands alienated to non-Indians since establishment of the Reservation	7
Third Exception: Proposed additional Decree provisions to implement and conform the 1979 Supplemental Decree	10
Fourth Exception: Allocation among the three Lower Basin States of the mainstream diversion rights recognized in favor of the five Indian Reservations	13
Conclusion	14
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Arizona v. California (Decree), 376 U.S. 340	2, 7, 10, 13
Arizona v. *California* (Supplemental Decree and Order), 439 U.S. 419	1-2, 10
Arizona v. *California* (Order), 440 U.S. 942	2
Arizona v. California (Order), 444 U.S. 1009	3
Colville Confederated Tribes v. *Walton*, 647 F.2d 42, cert. denied, Nos. 81-321 and 81-421	9
Mattz v. *Arnett*, 412 U.S. 481	9
Moe v. *Salish & Kootenai Tribes*, 425 U.S. 463	9
Seymour v. *Superintendent*, 368 U.S. 351	8-9

Cases—Continued: Page

United States v. *Ahtanum Irrigation District*, 236 F.2d 321, cert. denied, 352 U.S. 988 9
United States v. *Hibner*, 27 F.2d 909 9
United States v. *Powers*, 305 U.S. 527 9

Statutes:

Southern Pacific Railroad Grant Act of 1866, ch. 278, 14 Stat. 292 8
Swamp Land Act of 1850, ch. 84, 9 Stat. 519..... 8
18 U.S.C. 1151 8

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ON THE REPORT OF THE SPECIAL MASTER

MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF EXCEPTIONS

STATEMENT

The clear and comprehensive Report of the Special Master speaks for itself and we shall not further burden the Court by attempting a detailed summary here. A very brief synopsis will suffice.

1. The present proceedings were initiated in early 1979 when the Court appointed a Special Master and referred to him Motions to Intervene by the Tribes of the five lower Colorado River Indian Reservations[1] and the Motion of the United States for Modi-

[1] The Tribes and their respective Reservations (proceeding from North to South along the lower Colorado River) are: (1) the Fort Mojave Indian Tribe of the Fort Mojave Reservation, (2) the Chemehuevi Indian Tribe of the Chemehuevi Reservation, (3) the Colorado River Indian Tribes of the Colorado River Reservation, (4) the Quechan Indian Tribe of the Fort Yuma Reservation, and (5) the Cocopah Indian Tribe of the Cocopah Reservation.

fication of the Decree entered March 9, 1964. 439 U.S. 419, 436; 440 U.S. 942. The burden of each of these motions was to pray for supplemental diversion rights from the mainstream of the Colorado River on behalf of each of the five Reservations, in addition to those decreed in 1964 (see 376 U.S. 340, 344-345). Two categories of claims were advanced: the first, in respect of "practicably irrigable" acreage within the then conceded boundaries of the Reservations for which no claim had been made in the earlier proceedings ("omitted lands"); the second, in respect of practicably irrigable acreage restored to the Reservations by more recent final administrative, judicial or congressional decisions which adjusted the Reservation boundaries ("boundary lands"). Although overlapping in large part, the claims advanced by the Tribes, except in one instance (for the Cocopah Reservation), exceeded those asserted by the United States. See Report 21-22, 29, 106-110.

The States of Arizona, California and Nevada, together with four California Irrigation Districts and three municipalities in that State (referred to compendiously as "the State Parties"), opposed these claims. The "omitted land" claims were said to be foreclosed by the entry of the 1964 Decree; the "boundary land" claims—or most of them—were argued to be premature, because allegedly no "final determination," binding on the State Parties, of the extended boundaries had been made. Finally, the State Parties contested the right of the Tribes to intervene and appear by their own counsel, at least if the United States remained their active, but separate, champion. See Report 5, 22-25 and n.56.

2. In August, 1979, after briefing an oral argument, the Special Master decided a number of prelim-

inary questions. Memorandum and Report on Preliminary Issues.[2] He ruled that the Tribes should be allowed to intervene (*id.* at 5, 6-30), that the expanded Reservation boundaries were "finally determined" for present purposes (*id.* at 5, 31-41), and that evidence should be heard on the "omitted land" claims, albeit a final decision on the admissibility of those claims was deferred (*id.* at 5, 41). See final Report 25-28.

When the Master filed his Report on these preliminary issues, the State Parties sought leave to file exceptions. We opposed that course and the Court denied the motion. 444 U.S. 1009 (Jan. 1980). Thereafter, an extensive trial began before the Special Master, and continued at a number of adjourned sessions until April 7, 1981. Report 6-7. Full briefing followed and the Special Master submitted his final Report (dated February 22, 1982) to the Court in mid-March, 1982.

3. In his Report, the Special Master re-affirms his earlier rulings with respect to intervention by the Tribes (Report 26-27) and the finality of the boundary determinations (*id.* at 55-76). And he definitively rejects the State Parties' objection to the "omitted land" claims as foreclosed by the 1964 De-

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[2] This preliminary Report, dated August 28, 1979, is to be distinguished from the final Report dated February 22, 1982. Except as otherwise indicated, all citations to "Report" refer to the latter. The earlier preliminary Report, originally filed in typewritten form, is being printed under the supervision of the Special Master and will be submitted by him to the Court in due course. Because the printed document is not yet available, we cite here to the typewritten preliminary Report.

cree. *Id.* at 29-55. The Master then defines the general standards which he has followed. *Id.* at 88-105. And he goes on to consider in detail the several parcels alleged by the United States (*id.* at 125-196) and by the Tribes (*id.* at 197-277) to qualify for mainstream diversion rights as "practicably irrigable" acreage. Most of the claims advanced by the United States are sustained (*id.* at 113-117, 192-196), as well as a substantial number of the additional tribal claims (*id.* 117-121, 254, 263-267, 272-274, 276-277). Finally, the Report includes a recommended Decree in the form of an amendment to Article II(D) of the 1964 Decree. *Id.* at 281-283.

ARGUMENT

We endorse all the principal recommendations of the Special Master's final Report. And, with the exceptions hereafter noted, we acquiesce in those rulings that went against the United States. Indeed, our Exceptions relate only to certain points of amendment to the recommended Decree. In one instance, we pray for correction of what appears to be inadvertent error on a matter not in dispute; and otherwise, we suggest revisions or additional provisions which merely carry out the Master's findings and conclusions more explicitly. In each case, we have no reason to anticipate disagreement from the other parties.

The present memorandum is confined to supporting our own very limited Exceptions. Our submission on the larger, more controversial issues, must await the Exceptions which we presume will be filed by the State Parties. They will be discussed in our reply brief.

FIRST EXCEPTION: BOUNDARY LANDS IN THE "CHECKERBOARD AREA" OF THE FORT MOJAVE INDIAN RESERVATION DISALLOWED AS NOT FINALLY DETERMINED TO BE WITHIN THE RESERVATION

1. In the case of the Fort Mojave Reservation, the Special Master disallowed the claims of the United States for specified irrigable acreage solely on the ground that the areas in question, not treated as within Reservation boundaries in the prior proceedings, were not shown to have been subsequently determined to be Reservation lands by any formal or final action of the Department of the Interior. Report 76-85. The Master concluded that the equivocal "state of the record" before him did not "present a sufficient basis for an award of water rights with respect to these disputed parcels." *Id.* at 77. On the other hand, the Master made findings as to the practicably irrigable character of the disputed acreage (*id.* at 113-115 and n.13, 192-193), and he suggested that "[i]f the areas are later determined to be within the Reservation," those "findings as they apply to these lands may be reinstated at that time." *Id.* at 85.

For one area, the anticipated contingency is almost certain to occur well before this Court considers the case. We refer to U.S. Units FM-11, FM-12 and FM-13, accreted acreage in the so-called "checkerboard area" comprising some 641 gross irrigable acres. See Report 81-83, 192-193.[8] The fact is that

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[8] In accordance with the Special Master's conclusion that some 72 gross acres in Unit FM-12 were awarded diversion rights in the prior proceedings (Report 82 n.131), we have deducted this acreage. So, also, we have not included some 17 acres of Unit FM-11 that lie within the La Follette Tract or the 160 acres of tract D of Unit FM-13, a parcel of "omitted land" for which diversion rights were allowed by the Master.

survey work already undertaken shows those parcels to constitute accretion to Reservation lands and it only remains to complete those surveys and formally to recognize the consequent shift in Reservation boundaries as including these parcels. In normal course, that will happen in the ensuing ninety days. And, once this is done, the Reservation status of the disputed acreage will be "finally determined" for present purposes—no less than in respect of the other "boundary lands" for which diversion rights are proposed to be adjudicated by the Special Master's recommended Decree. See Report 55-76.

2. It is, of course, regrettable that this determination was not formalized before the Special Master issued his Report, and, indeed, is not yet complete. Yet, it is plain that when final approval of the surveys is entered, the lands will qualify for water allocations under the Master's ruling and that no further proceedings before the Master are required. In these circumstances, we deem it appropriate to ask the Court itself to notice the effect of the final administrative determination when it occurs.

We have no reason to suppose that the State parties will object to this procedure. Although they may continue to assert that *none* of the "boundary adjustments" are sufficiently final, we assume they will not single out this determination as less so than the others. At least in the absence of serious objection, it would be pointless to make a new reference to the Special Master, entailing further delay and requiring this Court ultimately to consider and enter still another amended decree.

We stress that, in this respect, we have no quarrel with the Special Master's conclusion. Indeed, his recommended Decree requires that diversion rights

be adjusted whenever subsequent boundary corrections are made by final and formal administrative determinations. Report 282. Nevertheless, the upshot is that the Decree we submit will diverge from the one recommended in the Report by presently including these disputed parcels as irrigable Reservation lands and assigning to them present diversion rights. Accordingly, we have labeled our submission on this point an "exception."

3. The net effect of sustaining this Exception would be to add 609 net acres in Arizona to the irrigable acreage of the Fort Mojave Indian Reservation entitled to mainstream diversion rights (641 gross acres x .95) and to increase the mainstream diversion rights of the Reservation by 3,934 acre-feet (609 net acres x 6.46). Accordingly, the respective figures in Paragraph II(D)(5) of the amended Decree should be 162,862 (instead of 158,928) acre-feet and 25,199 (instead of 24,590) acres. See Report 282.

SECOND EXCEPTION: FUTURE EXCLUSION FROM ENTITLEMENT TO DIVERSION RIGHTS OF RESERVATION LANDS ALIENATED TO NON-INDIANS SINCE ESTABLISHMENT OF THE RESERVATION

1. In the proceedings before Special Master Rifkind a question arose whether certain acreage within the exterior boundaries of the Fort Mojave Reservation for which the United States claimed water rights should be excluded because the lands allegedly were owned by non-Indians who traced their title to grants to the State of California or to a railroad before the establishment of the Reservation. Instead of resolving the issue, the Court included a proviso in Article II(D)(5) of its Decree, 376 U.S. 340, 345.

When a like question arose in the present proceedings, the United States proposed that it be dealt with in the same way. Motion of the United States for Modification of Decree and Supporting Memorandum (Dec. 1978) 14-17, 33. The Special Master indicated his agreement (Memorandum and Report on Preliminary Issues 40; see, also, final Report 75), and the parties did not debate the matter further. However, the Master's recommended Decree contains a much more wide-ranging provision excluding from entitlement to Reservation diversion rights any lands which are ultimately determined to "have been or are later conveyed or patented to non-Indians." Report 282. That broad exclusion was suggested by none of the parties and is perhaps based on a misreading of our submission, which encompassed only non-Indian lands alienated *before* the Reservation was created. At all events, we view the proviso, in its recommended form, as erroneous and take exception to its inclusion in the Court's Decree.

2. Once again, we have no reason to believe the State Parties disagree with our position on this matter. But, however that may be, we deem it important to seek modification of the proviso. In light of the 1964 Decree, we do not now contest that lands previously alienated under the Swamp Land Act of 1850, ch. 84, 9 Stat. 519, or the Southern Pacific Railroad Grant Act of 1866, ch. 278, 14 Stat. 292, which have remained in non-Indian ownership should be treated as excluded from a later established Indian Reservation. It does not follow, however, that parcels of Reservation acreage that fell into non-Indian ownership thereafter, or are at the some future time alienated to non-Indians, should also be excluded. On the contrary, the law is well settled the other way. See 18 U.S.C. 1151; *Seymour* v. *Superin-*

tendent, 368 U.S. 351 (1962); *Mattz* v. *Arnett*, 412 U.S. 481, 497, 504-505 (1973); *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 477-479 (1976).

To be sure, there has been some question whether irrigable acreage, although jurisdictionally remaining part of the Reservation, may share in tribal reserved water after it is transferred to non-Indian ownership. Yet, the outstanding decisions give, or indicate, an affirmative answer. See *United States* v. *Powers*, 305 U.S. 527 (1939); *Colville Confederated Tribes* v. *Walton*, 647 F.2d 42 (9th Cir. 1981), cert. denied, Nos. 81-321 and 81-421 (Nov. 30, 1981); *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957). At a minimum, it has generally been supposed that reserved water rights appertaining to Reservation lands may be transferred to a non-Indian purchaser to the extent the Indian seller had actually exercised his rights or the purchaser does so with reasonable dispatch. See *United States* v. *Hibner*, 27 F.2d 909 (D. Idaho 1928). But, whatever the ultimate resolution of this difficult question, it ought not be foreclosed by a casual provision in the Decree here.

3. If the present Exception is sustained, the last paragraph of the Decree recommended by the Special Master (Report 282-283) should be revised. For the sake of clarity and consistency, we suggest combining the two provisos included in the Master's proposed Decree into a single provision reading as follows:

> Provided that the number of practicably irrigable acres and the quantities of mainstream diversions specified in the foregoing paragraphs (1) through (5) shall be subject to appropriate upward or downward adjustment by agreement

or decree of this Court, in the event that the boundaries of any of the five Reservations are subsequently determined to include more or less lands than is presently determined or that lands presently included as entitled to Reservation diversion rights are subsequently determined not to be so entitled; such adjustment in the quantities of mainstream diversions shall be made by applying the appropriate unit diversion requirements listed in the Decree entered January 9, 1979 (439 U.S. at 422) to the number of net practicably irrigable acres within the lands subsequently determined to have been erroneously excluded or included.

THIRD EXCEPTION: PROPOSED ADDITIONAL DECREE PROVISIONS TO IMPLEMENT AND CONFORM THE 1979 SUPPLEMENTAL DECREE

1. In 1979, on the joint motion of the United States and the State Parties, the Court entered a supplemental decree in this case. 439 U.S. 419. The primary purpose of that decree was to particularize the "present perfected rights" to mainstream diversions in each of the three Lower Basin States, as had been contemplated by Article VI of the original Decree. See 376 U.S. at 351-352. With respect to such rights appertaining to the five Indian Reservations, however, there were three special provisions of substantial importance:

(a) The quantification of Reservation diversion rights was specified without prejudice to any additional entitlement that might result from boundary adjustments or from "omitted land" claims under Article IX of the 1964 Decree (Introductory paras. (2), (3) and (5), 439 U.S. at 421-422);

(b) All diversion rights of the Indian Reservations, whether presently quantified or later recognized, were accorded a first priority in time of shortage, regardless of priority dates, over all other rights to mainstream water in the three Lower Basin States except only certain specified "Miscellaneous Present Perfected Rights" (Introductory para. (5), 439 U.S. at 421-423); and

(c) It was expressly provided that the quantities of water now or later adjudicated for the benefit of each Indian Reservation, although calculated on the basis of irrigable acreage, need not be used for "irrigation or other agricultural application" (Introductory para. (5), 439 U.S. at 422-423).

The first of these provisions will have been given effect by the entry of the recommended Decree, subject to any future boundary adjustment, as the proposed Decree specifies. However, the Decree recommended by the Special Master makes no mention of the provisions summarized in paragraphs (b) and (c) above. We believe it is appropriate expressly to continue in effect those special provisions of the 1979 Decree. Plainly, the Master intended that result (see Report 104-105, 117, 121), and no party has suggested otherwise.

2. To this end, we suggest the following additions to the Decree recommended by the Special Master (Report 281-283):

(a) After the words 'ORDERED, ADJUDGED AND DECREED," substitute a colon for "THAT," begin a new paragraph labelled

"A", and continue as the Special Master has provided (with the revisions suggested in our First and Second Exceptions);

(b) Thereafter, add the following two paragraphs:

B. The provisions of Introductory Paragraphs (1) through (5) of the Decree entered herein January 9, 1979 (439 U.S. 419, 421-423), including the provision requiring first satisfaction in full in time of shortage of all Indian Reservation diversion rights regardless of priority dates except specified "Miscellaneous Present Perfected Rights" enjoying earlier priority dates, and the provision permitting usage of Reservation diversion rights for beneficial uses other than irrigation or other agricultural uses, shall remain in full force and effect and shall apply to all mainstream diversion rights adjudicated in favor of the five named Indian Reservations by the Decree of March 9, 1964, the Decree of January 9, 1979, the present Decree, and any supplemental Decree herein.

C. The quantities of mainstream diversion rights in favor of the said Indian Reservations specified in Paragraphs I(A), II(A) and III(A) of the Decree of January 9, 1979, shall be deemed amended in accordance with the present Decree.[4]

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[4] For the sake of clarity, we include as an Appendix the complete revised Decree we urge the Court to enter.

FOURTH EXCEPTION: ALLOCATION AMONG THE THREE LOWER BASIN STATES OF THE MAINSTREAM DIVERSION RIGHTS RECOGNIZED IN FAVOR OF THE FIVE INDIAN RESERVATIONS

One final "housekeeping" detail deserves mention. For lack of sufficient data in the record, the Special Master did not specify either (a) the respective number of Reservation irrigable acres located in each of the three States for which diversion rights are recognized, or (b) the priority dates for particular acreage where the Reservation was established by more than one instrument. See Report 105 n.3, 116-117 n.20, 121 n.37. As the Master explains (*id.* at 104-105), the second point is of no practical importance in light of the 1979 Decree which subordinates all mainstream diversion rights, except only minor "miscellaneous perfected rights," to those adjudicated in favor of the five Indian Reservations. On the other hand, the allocation of acreage—and appurtenant water rights—among the three States remains relevant. See 1964 Decree, Article II(B)(4) and Proviso following Article II(D)(9), 376 U.S. at 343, 346.

On this matter, however, it is anticipated that the parties will be able to agree. Accordingly, in due course, we shall submit to the Court a proposed additional provision quantifying the Reservation diversion rights which should be charged against each of the Lower Basin States.[5]

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[5] The text of such a provision, lacking most of the appropriate figures, is included as Paragraph (D) of our proposed Decree. Appendix, *infra*.

CONCLUSION

The Exceptions of the United States should be sustained and, in all other respects, the recommendations of the Special Master should be approved and the proposed Decree entered by the Court.

Respectfully submitted.

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MAY 1982

APPENDIX

Decree Proposed by the United States

It is ORDERED, ADJUDGED AND DECREED:

A. Article II(D)(1)-(5) of the Decree in this case entered on March 9, 1964, is hereby amended to read as follows:

(1) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 21,017 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 3,521 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907;

(2) The Cocopah Indian Reservation in annual quantities not to exceed (i) 10,197 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,601 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 27, 1917, for lands reserved by the Executive Order of said date; June 24, 1974, for lands reserved by the Act of June 24, 1974 (88 Stat. 266, 269);

(3) The Fort Yuma Indian Reservation in annual quantities not to exceed (i) 130,135 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 19,515 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of January 9, 1884;

(4) The Colorado River Indian Reservation in annual quantities not to exceed (i) 902,207

acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 135,333 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1865, for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date except as later modified; May 15, 1876, for lands reserved by the Executive Order of said date; November 22, 1915, for lands reserved by the Executive Order of said date;

(5) The Fort Mojave Indian Reservation in annual quantities not to exceed (i) 162,862 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 25,199 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 19, 1890, for lands transferred by the Executive Order of said date; February 2, 1911, for lands reserved by the Executive Order of said date;

Provided that the number of practicably irrigable acres and the quantities of mainstream diversions specified in the foregoing paragraphs (1) through (5) shall be subject to appropriate upward or downward adjustment by agreement or decree of this Court, in the event that the boundaries of any of the five Reservations are subsequently determined to include more or less lands than is presently determined or that lands presently included as entitled to Reservation di-

version rights are subsequently determined not to be so entitled; such adjustment in the quantities of mainstream diversions shall be made by applying the appropriate unit diversion requirements listed in the Decree entered January 9, 1979 (439 U.S. at 422) to the number of net practicably irrigable acres within the lands subsequently determined to have been erroneously excluded or included.

B. The provisions of Introductory Paragraphs (1) through (5) of the Decree entered herein January 9, 1979 (439 U.S. 419, 421-423), including the provision requiring first satisfaction in full in time of shortage of all Indian Reservation diversion rights regardless of priority dates except specified "Miscellaneous Present Perfected Rights" enjoying earlier priority dates, and the provision permitting usage of Reservation diversion rights for beneficial uses other than irrigation or other agricultural uses shall remain in full force and effect and shall apply to all mainstream diversion rights adjudicated in favor of the five named Indian Reservations by the Decree of March 9, 1964, the Decree of January 9, 1979, the present Decree, and any supplemental Decree herein.

C. The quantities of mainstream diversion rights in favor of the said Indian Reservations specified in Paragraphs I(A), II(A) and III(A) of the Decree of January 9, 1979, shall be deemed amended in accordance with the present Decree.

D. The mainstream diversion rights in favor of the said Indian Reservations specified in Paragraphs I(A), II(A) and III(A) of the Decree of January 9, 1979, to the extent con-

sumptively used, shall be charged against the apportionment of the States of Arizona, California, or Nevada, as there indicated. Additional mainstream diversion rights of the said Reservations recognized by the present Decree, to the extent consumptively used, shall be charged as follows:

(1) Against the State of Arizona:

——* acre-feet for the Fort Mojave Reservation

——* acre-feet for the Colorado River Reservation

——* acre-feet for the Fort Yuma Reservation

7,453 acre-feet for the Cocopah Reservation

(2) Against the State of California:

——* acre-feet for the Fort Mojave Reservation

9,677 acre-feet for the Chemehuevi Reservation

——* acre-feet for the Colorado River Reservation

——* acre-feet for the Fort Yuma Reservation

(3) Against the State of Nevada:

——* acre-feet for the Fort Mojave Reservation

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* Figures to be supplied in due course.

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No. 8, Original

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES WITH RESPECT TO ITS FIRST EXCEPTION TO THE SPECIAL MASTER'S REPORT

REX E. LEE
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Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 8, Original

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES WITH RESPECT TO ITS FIRST EXCEPTION TO THE SPECIAL MASTER'S REPORT

The First of our Exceptions to the Final Report of the Special Master in this case, filed in May 1982, addressed the recommended disallowance of water rights claimed by the United States in respect of specified irrigable acreage on the southwest boundary of the "checkerboard area" of the Fort Mojave Indian Reservation solely on the ground that, on the record before the Master, the land in question had not been shown to have been "finally determined" by formal action of the Department of the Interior to lie within the boundaries of the Reservation. See U.S. Exceptions 5–7. We represented that survey work under way was expected to confirm the Reservation status of a portion of that acreage as natural accretion to Sections concededly part of the Reservation; we stated that, when the survey was

complete, we would submit the result to the Court, and we indicated the anticipated net effect on the recommended decree. *Id.* at 6–7.

In their Answering Brief (at 1–2), the State Parties maintained their position with respect to all "boundary lands"—that "unilateral actions by the Secretary of the Interior" do not qualify as "final determinations" justifying additional river diversion rights under the Court's 1964 Decree. They agreed, however, that the acreage in question "should be treated the same as other 'boundary lands' in this case." *Id.* at 2. Nor did the State Parties interpose any objection to our submitting directly to the Court the evidence of final surveys covering this acreage.

A

The surveys alluded to have been completed, finally approved and filed. Accordingly, we herewith tender the relevant documents as part of the record in the case. Specifically, we are submitting to the Court (with copies to all parties):

1. A survey plat, in three sheets, officially accepted and filed September 16, 1982, covering:

(a) 131.63 acres of accretion to Section 4, T. 17N, R. 22W, G.& R.R.M., all of which are additional "boundary lands," being the major portion of an area identified as Parcel FM–11 in the Record of the case (17 acres of Parcel FM–11 having been treated by the Special Master as Reservation lands for which water rights have been recommended);

(b) 255.87 acres of accretion to Section 10 of the same Township, of which 234.41 acres constitute Parcel FM–12 (Lot 3, comprising a total of 21.46 acres, having been treated in the earlier proceedings as Reservation land for which

water rights have been adjudicated), and of which 162.41 acres are additional "boundary lands" (some 72 acres of Parcel FM–12 having been treated in the earlier proceedings as Reservation land for which water rights have been adjudicated);

(c) 1.75 acres of accretion to Section 22 of the same Township, no part of which is claimed as additional "boundary land" in this proceeding; and

(d) 383.84 acres of accretion to Section 24 of the same Township, of which 158.22 acres are additional "boundary lands" identified in the Record as Parcel FM-13A (Lots 5, 9, 10, 11, 12, 13 and 14, comprising a total of 225.62 acres, having been treated in the earlier proceedings as Reservation land for which water rights have been adjudicated);

2. The Field Notes appertaining to the foregoing survey;

3. A survey plat, approved March 22, 1963 and filed June 5, 1963, covering:

(a) 108.16 acres of accretion to Section 20, T. 17N, R. 21W, G.& R.R.M., of which 98.55 acres are additional "boundary lands" identified in the Record as Parcel FM–13B (Lot 2, comprising 9.61 acres, having been treated in the earlier proceedings as Reservation land for which water rights have been adjudicated); and

(b) 241.76 acres of accretion to Section 32 of the same Township, of which 200.12 acres are additional "boundary lands" identified in the Record as Parcel FM–13C (Lots 3 and 9, comprising a total of 41.64 acres, having been treated in the earlier proceedings as Reservation land for which water rights have been adjudicated);

4. The Field Notes appertaining to the foregoing survey; and

5. A letter dated September 17, 1982, from the Chief Cadastral Surveyor of Arizona to the Solicitor General, transmitting the foregoing documents (reproduced as Appendix A, *infra*, 1a–2a).

B

As we have elaborated in our Reply Brief (at 22–31), we believe neither the Court nor its Special Master is required to review this or any other final and formal administrative determination by the Department of the Interior defining Indian Reservation boundaries. Accordingly, we do no more than submit the documents evidencing the fact that such a final determination has been made. Suffice it to say that, in this instance (as the plats recite), the boundary adjustments are attributable to a gradual westward movement of the Colorado River between 1905 (when the previous survey was made) and the early 1950s (when the River was channelized), resulting in substantial accretion on the eastern bank, inuring to the Fort Mojave Reservation where it is the upland owner. See 1962 Field Notes (Item 2, *supra*) at 1B; 1982 Field Notes (Item 4, *supra*) at 3.

We add only that the process is long since complete and that, because of channelization, we anticipate no occasion for future adjustments. Indeed, it will be noted that, in most cases, accretion is not claimed to the present bank of the Colorado, but only to the bank defining the last natural bed of the river. That is because the further movement or narrowing of the channel, resulting from artificial channelization, has been treated (perhaps too conservatively) as avulsive and as not affecting land titles. See 1982 Field Notes (Item 4, *supra*) at 3; Appendix B, *infra*, 3a.

C

A word of explanation as to the acreage figures is appropriate. As we have noted in describing the surveys, we do not claim additional water rights for all the newly surveyed accretions. In three cases—Items 1(d), 3(a) and 3(b) above—that is because the portion of the accretions that merely completed or "squared off" fractional Sections originally designated as part of the Fort Mojave Indian Reservation were apparently treated as within the Reservation by Special Master Rifkind in the earlier proceedings and were accorded diversion rights by this Court in 1964. Thus, Parcels FM–13A, FM–13B and FM–13C embrace only the accretions to those Sections beyond their normal closing lines, as indicated on the attached sketch map (Appendix B, *infra*, 3a), taken from Exhibit SP 159.

The same considerations lead us to forego a claim for some 21.46 acres of the accretion to Section 10, T. 17N, R. 22W—Item 1(b) above. But, here, a further adjustment is necessary. As indicated in our Exceptions (U.S. Exceptions at 5 n.3), we accept the Special Master's finding that some 72 acres of Parcel FM–12 (cross-hatched on the attached sketch) were awarded diversion rights by the 1964 Decree. Accordingly, we omit any claim for that portion of Parcel FM–12.

In the case of Item 1(a), we claim all the surveyed accretion, but note that it is some 17 acres less than the area of Parcel FM–11. The reason is that those 17 acres, the northern "tail" of the parcel, appear to be embraced within the "LaFollette Tract," as to which the present Master has recommended water rights. See Report at 59, 192.

Finally, we make no claim in respect of Item 1(c) because that small area of accretion was not before the

Special Master and he therefore had no occasion to make a finding as to the practical irrigability of the parcel.

The upshot is that a total of 751 additional gross acres—which the Special Master has found "practicably irrigable"—have now been determined by formal surveys to lie within the boundaries of the Fort Mojave Reservation. This translates to 713 net irrigable acres which, applying the established water duty of 6.46 acre-feet per acre, increases the entitlement of the Reservation by 4,606 acre-feet of diversions. Unsurprisingly, the required adjustment is marginally greater than the overly conservative estimate recited in our Exceptions. Accordingly, the quantification of diversion rights for the Fort Mojave Reservation reflected in Article A(5) of the proposed Decree we submitted with our Exceptions (at 2a) should be amended to substitute 163,537 acre-feet (instead of 162,862 acre-feet) and the total acreage figure should be shown as 25,303 acres (instead of 25,199).

D

It will be noted that, in respect of the two southernmost areas of accretion, the survey was formally accepted in 1963. Obviously, the plat evidencing that survey could have been submitted to the Special Master to support the claim made for those areas. Unfortunately, that was not done, no doubt because this was part of a larger survey that was abandoned and the existence of the approved plat was overlooked. Indeed, the plat was noticed only after the Special Master's Report was filed—disallowing water rights for these and other like accreted lands—and the decision was made to complete the survey to identify the accretions to the north.

We submit, however, that our delinquency in this respect has in no way prejudiced the State Parties. If the newly completed survey is to be taken into account—as

we believe it should—there can be no objection to noticing also the limited survey completed some years ago. It is surely in everyone's interest to avoid a later return to this Court for that purpose.

E

We have been punctilious to avoid any arguable double claim, eliminating any acreage otherwise apparently included as Reservation lands in the prior proceedings or so treated by the present Special Master in his Final Report. The areas now claimed have been determined by official surveys to constitute natural accretion to tracts which are concededly part of the Fort Mojave Reservation. And the Special Master has expressly found the accreted acreage to be practicably irrigable. In these circumstances, it seems plain the additional acreage embraced by our First Exception should be treated as part of the Fort Mojave Indian Reservation and accorded appropriate river diversion rights.

Unless the Court were to accept the State Parties' contention that no administrative determination with respect to adjustment of Reservation boundaries is effective until judicially reviewed and approved, we submit no purpose would be served by referring the matter to the Special Master. Indeed, as we understand them, the State Parties share our view that if other formal and final decisions of the Interior Department with respect to Reservation boundaries are sufficient to justify an award of additional diversion rights, the same rule should be followed here. Of course, in this instance, as for all the other boundary adjustments, this Court's acceptance of the administratively determined boundary changes for the purpose of water allocation would be

without prejudice to any later judicial challenge in an appropriate forum. See the Proviso to Article A of our proposed Decree. U.S. Exceptions at 2a–3a.

Respectfully submitted.

REX E. LEE
Solicitor General

SEPTEMBER 1982

APPENDIX A

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
ARIZONA STATE OFFICE
2400 VALLEY BANK CENTER
PHOENIX, ARIZONA 85073

IN REPLY REFER TO

9600 (942)
Group 367, Arizona

September 17, 1982

Mr. Rex E. Lee
U.S. Solicitor General
U.S. Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20538

Dear Mr. Lee:

Enclosed are copies of the plat, in three sheets, and the field notes for T. 17 N., R. 22 W., Gila and Salt River Meridian, Arizona, and the plat and field notes for T. 17 N., R. 21 W., Gila and Salt River Meridian, Arizona.

The field notes for T. 17 N., R. 21 W., were approved March 12, 1963, and the plat, which is conformable to the field notes, was accepted, for the Director, Bureau of Land Management, on March 12, 1963 and was officially filed in the Arizona State Office on June 5, 1963.

The field notes for T. 17 N., R. 22 W., were approved September 16, 1982, and the plat, which is conformable to the field notes, was accepted, for the Director, Bureau of Land Management, on September 16, 1982 and was officially filed in the Arizona State Office on September 17, 1982.

In T. 17 N., R. 21 W., those lots in secs. 20 and 32, as shown on the enclosed plat, which lie west of the 1905 meander line are accretion to the Fort Mojave Indian Reservation.

In T. 17 N., R. 22 W., those lots in secs. 4, 10, 22 and 24, as shown on the enclosed plat, which lie southwest of the 1905 meander line are accretion to the Fort Mojave Indian Reservation.

I am sending, under separate cover, the additional copies of the field notes and plats of these two townships which have been requested for your use.

I will be available to answer any technical questions concerning these surveys.

Sincerely,

/s/ James P. Kelley

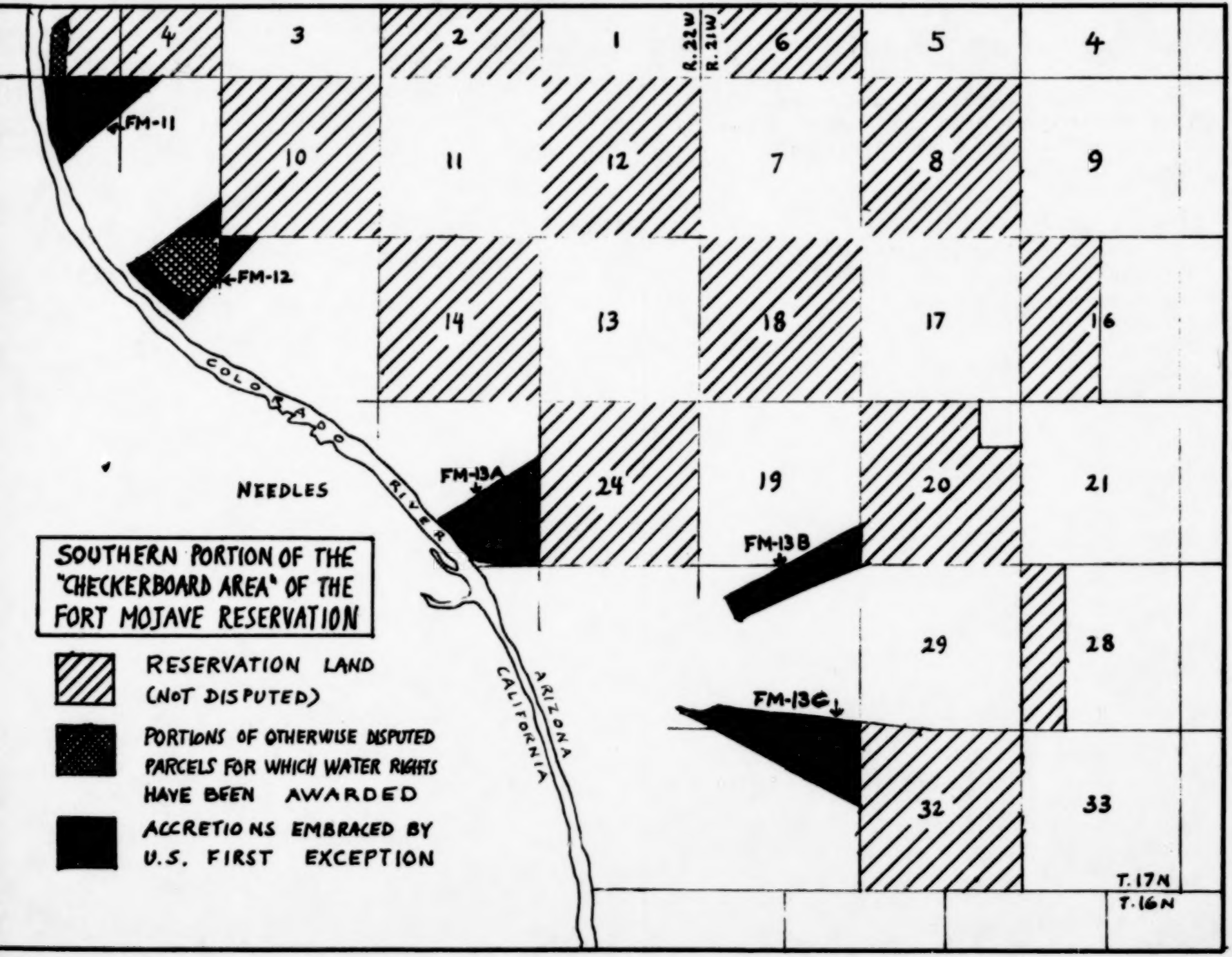
JAMES P. KELLEY
Chief Cadastral Surveyor of Arizona

Enclosures

APPENDIX B

[SKETCH MAP]

APPENDIX B


4
3
2
1
R.22W
R.21W
6
5
4
FM-11
10
11
12
7
8
9
FM-12
14
13
18
17
16
COLORADO RIVER
NEEDLES
FM-13A
24
19
20
21
FM-13B
29
28
FM-13C
32
33
T.17N
T.16N
ARIZONA
CALIFORNIA
SOUTHERN PORTION OF THE "CHECKERBOARD AREA" OF THE FORT MOJAVE RESERVATION
RESERVATION LAND (NOT DISPUTED)
PORTIONS OF OTHERWISE DISPUTED PARCELS FOR WHICH WATER RIGHTS HAVE BEEN AWARDED
ACCRETIONS EMBRACED BY U.S. FIRST EXCEPTION

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IN THE

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OCTOBER TERM, 1982

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v.

STATE OF CALIFORNIA, ET AL.

On The Report Of The Special Master

EXCEPTIONS OF THE CHEMEHUEVI, COCOPAH, COLORADO RIVER, FORT MOJAVE AND QUECHAN INDIAN TRIBES

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EXCEPTIONS OF THE CHEMEHUEVI, COCOPAH, COLORADO RIVER, FORT MOJAVE AND QUECHAN INDIAN TRIBES

The Chemehuevi, Cocopah, Colorado River, Fort Mojave and Quechan Indian Tribes respectfully concur in the exceptions and supporting memorandum to the final report of the Special Master filed by the United States.

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IN THE
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OCTOBER TERM, 1981

STATE OF ARIZONA, *Plaintiff*,

v.

STATE OF CALIFORNIA, ET AL., *Defendant*.

MOTION TO MODIFY ORDER

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No. 8, Original

In The Supreme Court of the United States

October Term, 1981

State of Arizona,
Plaintiff,

vs.

State of California, et al.,
Defendant.

MOTION TO MODIFY ORDER

This Honorable Court holds the power to change wrong to right. Hence, with this in mind the Quechan Indians joined by their neighboring tribes of the Lower Colorado River filed a petition to intervene in the case at bar requesting special hearings plus legal counsel of their own choosing so that a wrong committed by their trustee, the

United States, could be righted. In the wake of earlier hearings all five Indian tribes claimed that they had received less water than they should have, and that this was due to an inherent conflict of interest affecting their trustee. On Jan. 9, 1979 this Court took cognizance of their request by appointing the Honorable Elbert P. Tuttle as Special Master to conduct the requested hearings.

The special hearings that followed have now been concluded. The Master's Report has been filed. All parties have responded in writing, and this Court has ordered oral argument for one and one-half hours for Dec. 8, 1982, subject to the limitation that there be no more than two speakers for "each side". The Quechan Tribe sincerely believes that unless this Order is modified it could for all practical purposes negate the opportunity to right the wrong heretofore provided by Special Master Tuttle's Order allowing intervention by each tribe with independent legal counsel chosen by them. This result becomes quite clear if one merely reflects

upon the following facts:

First, this is not a case with only two sides. In the beginning there were only two states. The number has increased. In addition, there is the United States appearing for its own interests and as trustee for the Indians. Then, because of the conflict of interest besetting the United States, there are also five autonomous Indian tribes with independent legal counsel.

Second, during the special hearings the Quechan Tribe was consistent with its original position that there existed a conflict of interest. It therefore presented a case against its trustee for failure to adequately represent it in the first hearings and the refusal of the trustee to present any case whatsoever regarding most of the acreage claimed on their behalf in the recent hearings. Special Master Tuttle summarized the situation when he said:

"I believe that the 'omission' of a significant amount of factually supportable

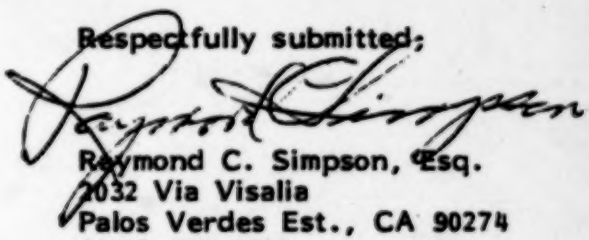
claims clearly occurred in the earlier proceedings. Although the United States lawyers at the earlier trial presented substantail claims for the Tribes, these claims fell short of the maximum possible claims under the standards required by the prior Master. In a paternalistic sense the result obtained by the United States might seem fair because the Tribes received much-needed water rights. But the trustee's duty is not to decide what is fair, his duty is to present the best case for his Indian wards. An objective view of the facts reveals that actual fairness was not achieved in the sense that under the legal standards applied in this case the Tribes would have received more if the United States as trustee had dedicated its efforts to maximizing the Tribes' welfare." (Report at 48-49)

To substantiate its claims the Quechan Tribe engaged independent experts to establish its water entitlement. The results of their work proved that the Tribe's entitlement was considerably in excess of that asserted on its behalf by the United States. In contrast, the other tribes elected to present no evidence regarding the conflict of interest, and this therefore made it imperative for the Quechan Tribe to file a "Separate Response". Thus, against this backdrop it must be noted that the Quechan "side" will not be presented in the oral argument phase of the case at bar unless the Order pertaining to the number of speakers is modified to permit three.

The Quechan Tribe has contacted Mr. Carl Boronky in his capacity as a spokesman for the State Parties. He stated that the States have no objection to a change in the number of speakers since they would also like to have three for the three states. The United States obviously can offer no objection since the number it set forth in

its earlier Motion provided for five speakers. The other four tribes have agreed upon the one speaker to present their "side", but without allowing an additional speaker to present the Quechan "side", the Quechan Tribe would be denied its day in court. Therefore, the Quechan Tribe does hereby move this Honorable Court to modify its Order to permit three speakers.

Respectfully submitted,



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IN THE

Supreme Court of the United States

October Term, 1981

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

ANSWERING BRIEF OF THE STATES OF ARIZONA, CALIFORNIA, AND NEVADA AND THE OTHER CALIFORNIA DEFENDANTS TO THE EXCEPTIONS AND SUPPORTING MEMORANDUM OF THE UNITED STATES AND THE CHEMEHUEVI, COCOPAH, COLORADO RIVER, FORT MOJAVE, AND QUECHAN INDIAN TRIBES.

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IN THE

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October Term, 1981

STATE OF ARIZONA,

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vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

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Impleaded Defendants.

ANSWERING BRIEF OF THE STATES OF ARIZONA, CALIFORNIA, AND NEVADA AND THE OTHER CALIFORNIA DEFENDANTS TO THE EXCEPTIONS AND SUPPORTING MEMORANDUM OF THE UNITED STATES AND THE CHEMEHUEVI, COCOPAH, COLORADO RIVER, FORT MOJAVE, AND QUECHAN INDIAN TRIBES.

The United States, with the concurrence of the five Indian Tribes, has filed four Exceptions to the Report of Special Master Elbert P. Tuttle. The State Parties hereby answer those Exceptions as follows:

FIRST EXCEPTION: The State Parties agree with the United States that boundary lands within the "checkerboard

area" of the Fort Mojave Reservation should be treated the same as other "boundary lands" in this case. That is, the State Parties contend that such lands should not be assigned water rights until and unless their boundaries are finally determined and that unilateral actions by the Secretary of the Interior on behalf of the United States, a party to the lawsuit, utterly fail to qualify as such final determinations. Moreover, the prospect of the United States purporting to rule in the future that such checkerboard lands are within the Fort Mojave Reservation, at which time the irrigable portions of such lands automatically qualify for water rights, merely underscores the outrageous denial of due process to the State Parties that such a result would entail. With a stroke of a pen, the United States could unilaterally decide whether 641 gross irrigable acres are or are not entitled to water rights. However arbitrary, capricious, or merely wrong that decision *might* be, no other party to this lawsuit would have any legal recourse to challenge it. The United States' argument on the finality of boundaries must be rejected.

SECOND EXCEPTION: The State Parties agree with the United States that the question of reserved water rights for reservation lands alienated to non-Indians after the establishment of the reservations should not be foreclosed by a casual provision in the Special Master's proposed Decree. The State Parties therefore accept the substitute provision offered by the United States.

THIRD EXCEPTION: The State Parties have no objection to adding provisions so as to conform to the 1979 Decree. However, the United States has misstated the so-called subordination clause (which was stipulated to by all parties) of the 1979 Decree by saying that *all* Indian Reservation diversion rights are to be satisfied first in times of shortage, irrespective of priority date (except for Miscel-

laneous Present Perfected Rights). The subordination clause of the 1979 Decree applies *only* to: 1) Indian reservation rights *then* recognized in Article II(D)(1-5); and 2) any additional rights recognized as the result of the final determination of reservation boundaries.[1] The subordination clause says nothing whatsoever about additional rights recognized for so-called "omitted lands." In fact, this Court inquired about the absence of any such language during oral argument in October 1978:

> "Q. [Justice Stewart] That takes care, however, of only one part of the Indians' claims to greater reservations of water, does it not? One was the effect of new boundaries, and the other was the effect of a mistake stemming from failure of zealous representation by the United States or from whatever cause in the original allocation of irrigable acreage; is that not right?
>
> "MR. NOBLE: That is true, Your Honor. We have excluded these from the subordination agreement because we have taken the position that recalculation of irrigable acreage for the lands that existed in the reservations, that were recognized as reservation lands in 1964, is barred by *res judicata* because the Indians were adequately represented and because the issues were fully litigated at that time.

---

[1] "(5) In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Art. II(B)(3) of said Decree, the Secretary of the Interior shall, before providing for the satisfaction of any of the other present perfected rights except for those listed herein as 'MISCELLANEOUS PRESENT PERFECTED RIGHTS' (rights numbered 7-21 and 29-80 below) in the order of their priority dates without regard to State lines, first provide for the satisfaction in full of all of the Chemehuevi Indian Reservation, Cocopah Indian Reservation, Fort Yuma Indian Reservation, Colorado River Indian Reservation, and the Fort Mojave Indian Reservation as set forth in Art. II(D)(1)-(5) of said Decree, provided that the quantities fixed in paragraphs (1) through (5) of Art. II(D) of said Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." (1979 Decree.)

"We also feel that these claims are basically limitless claims. I think the various submissions we have here have so many different figures and such huge claims that we felt we simply could not subordinate to something like that." (Transcript, pp. 8-9 — Oral Argument 10-9-78.)

The State Parties have never consented to subordinate any of our prior rights to any reservation rights for "omitted lands" and decline to do so now. We contend that it is not proper to even award rights for such lands, much less to subordinate any of our priorities to them. We therefore agree to the United States' additional provisions only if paragraph B is modified so as to reflect the actual language of paragraph (5) of the 1979 Decree. This should be done simply by striking all language following "January 9, 1979 (439 U.S. 419, 421-423)," so that paragraph B would read:

"B. The provisions of Introductory Paragraphs (1) through (5) of the Decree entered herein January 9, 1979 (439 U.S. 419, 421-423)."

FOURTH EXCEPTION: We agree with the United States as to the necessity of listing Indian reservation water rights according to State and priority date for particular acreage. We also anticipate that we will be able to agree with the other parties as to those allocations.

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TABLE OF CONTENTS

Page

Reply to Exceptions of States 1

I. THE SPECIAL MASTER PROPERLY GRANTED THE TRIBES LEAVE TO INTERVENE 4

A. The Eleventh Amendment Cannot Bar the Tribes from Asserting Rights Against the Defendant California Agencies and other Private and Governmental Adverse Claimants Within the States 5

B. The Eleventh Amendment Does Not Bar Intervention of Parties Other Than States and the United States in Original Actions 8

C. 28 U.S.C. §1362, in Conjunction With the Constitutional Plan, Overcomes the States' Eleventh Amendment Immunity in This Case 13

D. The Government's Representation of Indian Interests in Litigation is Neither Complete Nor Exclusive 24

II. THE 1964 DECREE MAY BE MODIFIED TO ALLOW FOR ALLOCATION OF WATER FOR THE OMITTED LANDS UNDER ARTICLE IX OF THE DECREE 33

A. Article IX Empowers the Court to Modify the 1964 Decree and Grant the Claims for Omitted Lands 34

B. Neither the Principles of Res Judicata Nor the Doctrine of Law of the Case Preclude Consideration of the Omitted Lands Claims 41

III. THE SPECIAL MASTER PROPERLY CONCLUDED THAT THE BOUNDARIES OF THE RESERVATION ARE "FINALLY DETERMINED" 55

IV. THE SPECIAL MASTER PROPERLY DETERMINED THE NUMBER OF PRACTICABLY IRRIGABLE ACRES ON EACH RESERVATION 56

A. The Tribes' Analysis and Findings of the Special Master Were Proper 56

B. State's Exceptions Are Unsupported by the Record 62

C. Large Portions of Lands for Which Allocation of Water is Sought by the Tribes Are Admittedly Practicably Irrigable 69

CONCLUSION 71

TABLE OF AUTHORITIES

CASES: Page

Aldinger v. Howard, 427 U.S. 1 (1976) 9, 10,11

Arizona v. California, 368 U.S. 917 (1961), reconsideratin denied, 368 U.S. 950, 373 U.S. 546 (1963), 376 U.S. 340 (1964), 439 U.S. 419 (1979). 12

Arizona v. California, 373 U.S. 546 (1963). 54

Arizona v. California, 376 U.S. 340 (1964) 37

Arizona v. California, 439 U.S. 419 (1969) 37

Byran v. Itasca County, 426 U.S. 373 (1976) 31

California v. Arizona, 440 U.S. 59 (1979). 16

Cappaert v. Unied States, 426 U.S. 128 (1976) 12

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 13, 17

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). 11, 12, 21

Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), cert. denied, _____ U.S. _____ 19

Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 533 (D. Or. 1977) 29

Cramer v. United States, 261 U.S. 219 (1923) 50

Crowe v. Eastern Band of Cherokee Indians, 506 F.2d 1231 (4th Cir. 1974) 28

Edleman v. Jordan, 415 U.S. 651 (1974) 6

Employees v. Missouri Public Health & Welfare Department, 411 U.S. 279 (1973) 14

Fisher v. District Court, 424 U.S. 382 (1976) 28

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 15

Freeman v. Howe, 65 U.S. (24 How.) 450 (1861) 11

Hans v. Louisiana, 134 U.S. 1 (1890) 13

Hansberry v. Lee, 311 U.S. 32 (1940) 23

Heckman v. United States, 224 U.S. 413 (1912) 25, 26, 27, 30

Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911) 6

Hutto v. Finney, 437 U.S. 678 (1978) 14, 17

Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) 29

Lac Courte Oreilles Bank of Lake Superior Chippewa Indians v. FPC, 510 F.2d 198 (D.C. Cir. 1975) 29

Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977) 30

Maryland v. Louisiana, 451 U.S. 725 (1981) 8, 9, 12

McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) 15, 18

Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894 (1982) 14, 15, 20, 22

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 28

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 1976) 16-21, 31

Montana v. United States, 450 U.S. 544 (1981) 20

Morton v. Mancari, 417 U.S. 535 (1974) 28

Mt. Healthy City Bd. of Education v. Doyle, 429 U.S. 274 (1977) 5

New Jersey v. New York, 345 U.S. 369 (1953) 5

New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), cert. denied, 429 U.S. 1121 30

Oklahoma v. Texas, 258 U.S. 574 (1922) 8

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 17

Owen Equipment and Erection Co. v. Howard, 437 U.S. 365 (1978) 11

Parden v. Terminal R. Co., 377 U.S. 184 (1964) 14

Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968) 22, 26

Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) 7, 13, 14

Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D. D.C. 1973) 29

Smith v. Reeves, 178 U.S. 436 (1900) 13

Stewart v. Dunham, 115 U.S. 61 (1885) 11

Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) 11

Texas v. Louisiana, 416 U.S. 965 (1974) 8

Trbovich v. United Mine Workers, 404 U.S. 528 (1972) 23, 26

United States v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1956), cert. denied, 352 U.S. 988, following remand, 330 F.2d 897 (9th Cir. 1964), rehearing denied with opinion, 338 F.2d 307 (9th Cir. 1964), cert. denied, 381 U.S. 924 28

United States v. California, 332 U.S. 19 (1946) 50

United States v. Candelaria, 271 U.S. 432 (1926) 22

United States v. Clarke, 445 U.S. 253 (1980) 20

United States v. Michigan, 653 F.2d 277 (6th Cir. 1981), cert. denied, ____ U.S. ____ 19

United States v. Minnesotta, 270 U.S. 181 (1926) 15

United States Immigration and Naturalization Service v. Hibi, 414 U.S. 5 (1973) 50

United States v. Truckee-Carson Irrigation District, 649 F.2d 1286 (9th Cir. 1981), petitions for certiorari pending 23, 27, 29, 30

United States v. Wheeler, 435 U.S. 313 (1978) 13

United States v. Winnebago Tribe, 542 F.2d 1002 (8th Cir. 1976) 24

Utah Power and Light Co. v. United States, 243 U.S. 389 (1916) 50

Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965) 17

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980) 20

Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979) 20

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 23, 28

Williams v. Lee, 358 U.S. 217 (1959) 17

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) 20

Winters v. United States, 207 U.S. 564 (1908) 35

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 14

Wyoming v. Colorado, 286 U.S. 494 (1932) 5

Yoder v. Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, 339 F.2d 360 (9th Cir. 1964) 17

CONSTITUTIONAL PROVISIONS

U.S. Const., Eleventh Amendment 7-10, 12, 13, 15, 17, 18, 24

U.S. Const., Fourteenth Amendment 15

U.S. Const., art. I § 8, cl. 3 ..... 14, 15

STATUTES

25 U.S.C. S 177 51

25 U.S.C. S 450a 23

25 U.S.C. S 476 ..... 24, 27, 50

28 U.S.C. S 1251 22

28 U.S.C. S 1345 ..... 21, 22

28 U.S.C. S 1362 ..... 13, 16, 17, 21

MISCELLANEOUS

116 Cong. Rec. 23395 (1970) 29

H.R. Rep. No. 458 97th Cong. 2d Sess., House Committee on Interior and Insular Affairs, March 15, 1982 on H.R. 5539 53

H.R. Rep. No. 2040 89th Cong. 2d Sess. 2-3 (1966). reprinted in 1966 U.S. Code Cong. & Ad News 16, 17, 20, 21

S. Rep. No. 1080, 73d Cong., 2d Sess. (1934) 24

Subcommittee on Administrative Practice and Procedure of the Judiciary, 92d Cong. 1st Sess. (Comm. Printing 1972) 29, 30

Toward Economic Development for Native American Communities, 91st Cong. 1st Sess. (Comm. Printing 1969) 29

Chambers, "A Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources", Toward Economic Development for Native American Communities, 91st Cong. 1st Sess. (Comm. Printing 1969) 30

TEXTS

Meriam, Problem of Indian Administration (1928) 27

1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974 (1936) (GPO 1979) 24

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In the following portions of this Brief the Chemehuevi, Cocopah, Colorado River, Fort Mojave and

Quechan Indian Tribes (hereinafter "Tribes") address the arguments of the State Parties (hereinafter "States") in support of their numerous Exceptions to the Special Master's Report dated February 22, 1982[1], which fall within four basic areas of consideration.

The Tribes first dispute the States' contention that the Special Master erred in granting the Tribes leave to intervene in these proceedings. The final findings of the Special Master indicate the wisdom of his decision to permit intervention.

The Tribes next dispute the States' Exceptions to the Special Master's determination that the 1964 Decree

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1 See, Exceptions of the States of Arizona, California and Nevada and the other California Defendants to the Report of Special Master Elbert P. Tuttle; and Brief of said Parties in Support of Exceptions (hereinafter "States' Brief"); Exception of the State of Arizona to the Report of Special Master Tuttle dated February 22, 1982 and Brief in Support of Exception (hereinafter "Arizona's Brief"); and Exceptions of the California Agencies to the Report of Special Master Elbert P. Tuttle; Brief of said Parties in Support of Exceptions (hereinafter "California Agencies' Brief").

should be modified to allocate additional present perfected rights for all practicably irrigable lands which were within the undisputed boundaries of the Indian reservations and for which no rights were awarded in the prior proceedings (hereinafter the "omitted lands"). In the circumstances of this case, Article IX of the 1964 Decree is properly invoked to correct the substantial error in the prior proceedings.

The States' contention that the Special Master erred in finding that certain boundaries of the reservations had been "finally determined" under the 1964 Decree is additionally challenged by the Tribes. The additional rights claimed by the Tribes for practicably irrigable lands determined to be within the reservations as a result of boundaries being finally determined should be awarded without further delay.

Finally, the Tribes assert that the States' Exceptions to the Special Master's factual determination of practicably irrigable acreage is not supported by the record and should be rejected.

I. THE SPECIAL MASTER PROPERLY GRANTED THE TRIBES LEAVE TO INTERVENE.

The Special Master concluded that the Tribes satisfied the applicable criteria for intervention. (Special Master's 1979 Memorandum and Report at 6-14.) The States take minor exception to this conclusion. (States' Brief at 119, 125-127.)[2] Their principal objection to the Tribes' participation is founded on the States' sovereign immunity as embodied in the Eleventh Amendment to the Constitution. (States' Brief at 6-8, 118-127.)

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[2] Contrary to the States' contention (States' Brief at 126), the Special Master did not rely on Rule 24 of the Federal Rules of Civil Procedure to circumvent the Eleventh Amendment. See, Special Master's Report at 26-27. The States' additional argument that the Tribes must be denied intervention for failure to meet the requirements of Rule 24 is also without merit. See, Special Master's 1979 Memorandum and Report at 6-14; infra at 24.)

A. The Eleventh Amendment Cannot Bar the Tribes from Asserting Rights Against the Defendant California Agencies and other Private and Governmental Adverse Claimants Within the States.

The States' Exception to intervention based on the Eleventh Amendment is anomalous in one respect. As the States readily admit, their sovereign immunity defense is asserted by the three States in their parens patriae capacity. (States' Brief at 120-121.) In that capacity, states stand in judgment for their individual water users. New Jersey v. New York, 345 U.S. 369, 372-73 (1953); Wyoming v. Colorado, 286 U.S. 494, 506-09 (1932). Yet the Eleventh Amendment defense is not available to private individual water users, or even to political subdivisions or most other governmental entities. Mt. Healthy City Bd. of Education v. Doyle, 429 U.S. 274, 280 (1977).

From the inception of this case, the parties have included seven major California water users, named as parties defendant in Arizona's Complaint, all of which are political subdivisions or municipal corporations.

These entities are "the California parties most directly affected by additional water allocations to the reservations based upon the claims of enlarged reservation boundaries." (California Agencies' Brief at 5.) Yet, no argument is made, nor could one be constructed, that the Eleventh Amendment precludes the five Tribes from asserting rights against those agencies. Consequently, the Tribes should be able to assert and enforce in this proceeding the additional water rights awarded by the Special Master against these California agencies even if the Eleventh Amendment immunity of the three States is upheld. See, e.g., Edelman v. Jordan, 415 U.S. 651, 667 n. 12 (1974); Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911).

The situation presented by the Tribes' intervention vis-a-vis the California agencies and other water users other than the three States highlights the difficulties inherent in applying the States' Eleventh Amendment defense. In this suit, this Court has acquired exclusive jurisdiction over the subject matter, the States

are appearing parens patriae on behalf of their citizens, several of the existing parties are not immune from the Tribes' claims, and the three States' sovereign immunity has been waived "as a necessary feature of the formation of a more perfect Union... inherent in the constitutional plan." Principality of Monaco v. Mississippi, 292 U.S. 313, 329 (1934). The outcome of this case and the quantity of precious Colorado River water adjudicated to the Tribes should not hinge on such happenstance as Arizona's decision to join the California agencies while the United States and the other States were content to proceed solely against each other in their parens patriae capacities. Rather, the Tribes should be allowed to assert their claims against the three States as well as the California agencies.[3]

---

[3] If intervention is allowed but limited by the Eleventh Amendment, the Tribes would then have to seek joinder of the principal water users in the three States to obtain complete relief. In these circumstances, application of the Eleventh Amendment would present an inconvenient, judicially uneconomical and unnecessary alternative.

B. The Eleventh Amendment Does Not Bar Intervention of Parties Other Than States and the United States in Original Actions.

This Court has previously granted intervention to parties in original actions whose claims against states would otherwise be barred by the Eleventh Amendment. Maryland v. Louisiana, 451 U.S. 725, 745-46 n. 21 (1981); Texas v. Louisiana, 416 U.S. 965 (1974); Oklahoma v. Texas, 258 U.S. 574, 581 (1922). In the most recent decision, Maryland v. Louisiana, supra, overlooked by the States, the Court expressly held that "our original jurisdiction is not affected by the provisions of the Eleventh Amendment (unless) the plaintiff State is actually suing to recover for injuries to specific individuals." The Court then accepted the Special Master's recommendation that seventeen pipeline companies be permitted to intervene as Plaintiffs and noted that "it is not unusual to permit intervention of private parties in original actions." 451 U.S. at 745-46 n.

21. This holding is dispositive of the States' Eleventh Amendment Exception.[4]

The most satisfactory general rationale for permitting intervention in original actions is the Court's ancillary jurisdiction. That doctrine is "bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests without regard to jurisdiction." Aldinger v. Howard, 427 U.S. 1, 11 (1976). In this case, the Court has acquired and retained exclusive jurisdiction to determine the quantity of water that has been reserved for the benefit of the five Indian reservations. (Special Master's Report at 27.) Accordingly, the Special Master properly placed primary

4 There is no mistaking the import of the Court's unequivocal and unconditional grant of intervention in the same footnote that it reached and resolved the ultimate merits of the suit. Maryland v. Louisiana, supra, firmly establishes that the Eleventh Amendment does not bar intervention against states in original actions as long as the intervenor's claims are encompassed within the subject matter of the action.

reliance on this Court's ancillary jurisdiction in holding that the Eleventh Amendment does not bar the Tribes' intervention against the States for the purposes of supporting the claims made on their behalf by the United States and of advancing their own additional claims. (Special Master's 1979 Memorandum and Report at 19-24.)

The States' sole argument against the Special Master's reliance on this Court's ancillary jurisdiction is that "(a)ncillary jurisdiction applies to claims and is not concerned per se with what parties assert those claims." (States' Brief at 121.) This assertion is mistaken. The extensive discussion of both pendent and ancillary jurisdiction in Aldinger v. Howard, supra, at 10, makes clear that the latter, in contrast to the former, has traditionally involved the addition of parties rather than claims. 427 U.S. at 6-16. See, e.g., 427 U.S. at 10: "Under this doctrine (of ancillary jurisdiction), the Court has identified certain considerations which justified the impleading of parties with respect to whom there was no

independent basis of federal jurisdiction." The cases discussed in Aldinger, Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1861); Stewart v. Dunham, 115 U.S. 61, 64 (1885); and Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 364-67 (1921), involve intervention by parties over whom the courts originally would have lacked jurisdiction for one reason or another but were nevertheless allowed or ordered to participate owing to the courts' previously acquired jurisdiction over the subject matter. This case is no different.

The States' reliance on Owen Equipment and Erection Co. v. Howard, 437 U.S. 365 (1978), and a subsequent part of the Aldinger opinion, 427 U.S. at 16-17 (States' Brief at 121), is misplaced because those cases concern statutory limitations on a federal court's jurisdiction over non-federal claims. See, Owen, supra, 437 U.S. at 372. In this case, by contrast, the Tribes' claims are predicated entirely on federal law, Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976), and there are no statutory

impediments to the resolution of those claims in the federal court system. Cappaert v. United States, 426 U.S. 128, 145 (1976); Colorado River Water Conservation District v. United States, supra, 424 U.S. at 807-09; Arizona v. California, 373 U.S. 546, 596-601 (1963). The only question here is whether the Eleventh Amendment precludes the Tribes from asserting their claims against the three States to a res over which the Court has acquired and is exercising exclusive jurisdiction. The Special Master was correct in concluding that the doctrine of ancillary jurisdiction compels a negative answer to that question. Maryland v. Louisiana, supra.[5]

---

5 The States rely on the Court's denial of the Navajo Tribe's Motion for Leave to Intervene in the prior proceedings. Arizona v. California, 368 U.S. 917 (1961), reconsideration den., 368 U.S. 950. States' Brief at 126-27. But these summary orders do not provide any support to the States' Eleventh Amendment argument. The Navajo's Motion was late and was opposed by the United States. The Master declined to rule on the Navajo's rights which were not affected by the Court's decree. See, Arizona v. California, 373 U.S. 546, 595 (1963). The denial of intervention could have rested on any one of numerous grounds, including untimeliness and failure to then satisfy the applicable criteria. There is no basis for assuming that the Eleventh Amendment had anything to do with the Court's decision.

C. 28 U.S.C. §1362, In Conjunction With the Constitutional Plan, Overcomes the States' Eleventh Amendment Immunity in This Case.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Amendment itself does not by its terms encompass suits by Indian tribes against states because Indian tribes are neither citizens of another state nor citizens or subjects of any foreign state. United States v. Wheeler, 435 U.S. 313, 322-28 (1978); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Nevertheless the Amendment has been construed broadly to preclude unconsented suits against a state by one of her own citizens Hans v. Louisiana, 134 U.S. 1 (1890), by foreign states, Principality of Monaco v. Mississippi, 292 U.S. 313 (1934), and by federal corporations, Smith v. Reeves, 178 U.S. 436 (1900), based on the theory that the Amendment maintains the states' preexisting immunity from suit in

the federal courts except where the waiver of that immunity is inherent in the constitutional plan. Principality of Monaco, supra, 292 U.S. at 322-23, 328-30. It is also well established, as conceded by the States (States' Brief at 122), that the states' immunity can be abrogated by Congress. Hutto v. Finney, 437 U.S. 678, 693 (1978); Employees v. Missouri Public Health & Welfare Dept., 411 U.S. 279, 282-87 (1973); Parden v. Terminal R. Co., 377 U.S. 184, 190-92 (1964).

Indian tribes are, of course, part of the constitutional plan. The Commerce Clause, art. I, §8, cl. 3, empowers Congress "(t)o regulate Commerce with foreign Nations, and among the several States, with the Indian Tribes." The Indian Commerce Clause has been utilized as "a shield (that) protect(s) Indian tribes from state and local interference," Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894, 910 (1982), in furtherance of the constitutional plan under which the regulation of Indian affairs is "committed exclusively to the government of the Union." Worcester v. Georgia, 31 U.S. (6 Pet.) 515,

561 (1832). Consequently, the Indian Commerce Clause, like the Fourteenth Amendment, necessarily entails inherent limitations on state sovereignty. Compare, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). The States may have surrendered their immunity by virtue of the Indian Commerce Clause where, as here, tribes sue states to prevent interference with rights secured by federal law.[6]

In this case, there is no need to consider whether the Indian Commerce Clause, standing by itself, would suffice to overcome the States' Eleventh Amendment defense to the Tribes' water rights claims. Acting pursuant to that clause,[7] Congress in 1966

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6 In United States v.Minnesota, 270 U.S. 181, 193-95 (1926), the Court assumed in dictum that unconsented suits by Indians against states were precluded by the Eleventh Amendment. The Court did not consider the unique sovereign status of the Indian tribes or their place in the constitutional plan. See, Special Master's 1979 Memorandum and Report at 18 n. 30.

7 See, Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894, 911 n. 21 (1982); McClanahan v. Arizona Tax Commission, 411 U.S. 164, 172 n. 7 (1973).

enacted 28 U.S.C. §1362, which confers federal district court jurisdiction over suits brought by Indian tribes that arise under the Constitutions, laws or treaties of the United States. This statute was intended to provide "the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys." H.R. Rep. No. 2040, 89th Cong. 2d Sess. 2-3 (1966), reprinted in 1966 U.S. Code Cong. & Ad. News, 3145, 3147. Based on that legislative history, this Court found in Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 473 (1976), that "Congress contemplated that a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws or treaties' would be at best in some respects as broad as that of the United States suing as the tribe's trustee."[8] The Special Master

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8 Although by its terms Section 1362 is limited to suits brought in the federal district courts, it should be given the same effect in original actions in this Court which arise under federal law and implicate a tribe's vital interests. See, California v. Arizona, 440 U.S. 59 (1979). See also, Special Master's Report at 27 n. 58; Special Master's 1979 Memorandum and Report at 31.

followed the teaching of Moe and held that Section 1362 overcomes the three States' Eleventh Amendment immunity in the particular circumstances presented by this case. (Special Master's 1979 Memorandum and Report at 26-31; Special Master's Report at 27.)[9]

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9 This Court has held that the applicable standard for determining whether the States' immunity has been limited or abrogated depends upon the subject matter and background of the legislation at issue as well as its relationship to the Constitution. Hutto v. Finney, 437 U.S. 678, 698 n. 31 (1978). Section 1362 was enacted against the backdrop of more than a century of disputes and litigation in which the interests of the states frequently came into conflict with those of the United States and the tribes. See, e.g., Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Williams v. Lee, 358 U.S. 217 (1959); Warren Trading Post v. Arizona Tax Comm'n., 380 U.S. 685 (1965). See generally, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-74 (1974). Indeed, the very suit which prompted the enactment of Section 1362, Yoder v. Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, 339 F.2d 360 (9th Cir. 1964), see H.R. Rep. No. 2040, 89th Cong. 2d Sess. 2, 4-5 (1966), reprinted in 1966 U.S. Code & Ad. News, 3145, 3146-47, 3149, was a challenge to a state oil and gas commission's authority over tribal minerals. These circumstances make it plain that in enacting Section 1362, Congress contemplated that tribes would become increasingly active in litigation to enforce and protect their rights and that such suits would undoubtedly pit the tribes and the states as adversaries. Some limitation of the states' Eleventh Amendment immunity therefore must have been intended. See also, Special Master's 1979 Memorandum and Report at 29-31.

The States concede that Section 1362 as applied in Moe could overcome the Eleventh Amendment defense. (States' Brief at 122-25.) Their principal contention is that their Eleventh Amendment immunity remains intact so long as the United States appears in the litigation as the Tribes' trustee. (States' Brief at 122, 123.)

There is no basis for construing Section 1362 in such a "crabbed and restrictive" manner. See, McClanahan v. Arizona Tax Comm'n., 411 U.S. 164, 176 (1973). The effect of that interpretation here would be to impose a Hobson's choice on the Tribes: either forego the Government's legal representation of tribal interests against the States (assuming that the Tribes have any choice in the matter) or face the prospect that the Tribes' claims beyond those asserted by the Government will be foreclosed by the States' Eleventh Amendment immunity. The United States would confront a similar dilemma. The consequence of bringing or entering

litigation against a state on a tribe's behalf would be to impose a limit on the nature, scope and the extent of relief that the tribe might be able to obtain if it litigated on its own. It is virtually impossible to make intelligent decisions on such important matters at the onset of litigation, prior to any discovery, when the facts and underlying legal theories are not fully developed. Yet, under the States' theory, the United States and the Tribes would have to decide at a very early stage in the litigation which party would initiate suit. A further complication is that in the case of the Government initiating suit, there is no guarantee that the Government's positions and arguments might be modified or even abandoned during the course of litigation. See, e.g., United States v. Michigan, 653 F.2d 277, 278 (6th Cir. 1981), cert. den. _____ U.S. _____; Colville Confederated Tribes v. Walton, 647 F.2d 42, 46 n. 6 (9th Cir. 1981), cert. den. _____ U.S. _____.

The States attempt to draw support for their theory from Moe and the legislative history of Section

1362. (States' Brief at 122-23, 124 n. 56.) The Court in Moe does refer to the statement in the legislative history of Section 1362 that the proposed law "would provide for United States district court jurisdiction in those cases where the United States Attorney declines to bring an action and the tribe elects to bring the action." H.R. Rep. 2040, 89th Cong. 2d Sess. 2 (1966), reprinted in 1966 U.S. Code Cong. & Ad. News, 3145, 3147; Moe, supra, 425 U.S. at 472. Yet, the Court then continues in explanation with a specific reference to the situation in which tribes and the United States litigate as "coplaintiff(s)".[10] 425

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10 It has become commonplace in recent years for the United States and the tribes (or individual Indians) to appear jointly before this Court and present identical or largely overlapping claims. See, e.g., Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894 (1982); Montana v. United States, 450 U.S. 544 (1981); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980); United States v. Clarke, 445 U.S. 253 (1980); Washington v. Fishing Vessel Ass'n., 443 U.S. 658 (1979); and Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979). No one has objected to or challenged this practice. Nor is this case alone in presenting a situation in which the positions asserted by the Indian litigants goes beyond the contentions advanced by the United States on their behalf. See, e.g., United States v. Clarke, supra, 445 U.S. at 254 n. 1.

U.S. at 473. Congress was aware that there would not be any reason to confer jurisdiction when the United States initiates litigation on a tribe's behalf because 28 U.S.C. §1345 provides a federal forum for all suits brought by the United States. H.R. Rep. No. 2040, 89th Cong. 2d Sess. 3, 5 (1966), reprinted in 1966 U.S. Code Cong. & Ad. News, 3145, 3147, 3149. See, e.g., Colorado River Water Conservation District v. United States, 424 U.S. 800, 806-807 (1976). But there is nothing in the legislative history or in Moe to indicate that the congressional purpose of "assur(ing) the same judicial determination whether the action is brought on (the Tribes') behalf by the government or by their own attorneys,"[11] would vary depending upon whether jurisdiction was initially invoked by the Tribes under Section 1362, by the United States

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11 H.R. Rep. No. 2040, 89th Cong. 2d Sess. 2-3 (1966), reprinted in 1966 U.S. Code Cong. & Ad. News, 3145, 3147.

under Section 1345, or, for that matter, by a state or the United States pursuant to this Court's original jurisdiction, under 28 U.S.C. §1251.

The States' contention is equally deficient from a policy perspective. Insofar as it would encourage the United States to stay out of Indian litigation, it would act as a deterrent to the fulfillment of the Government's trust responsibilities, and, in addition, would leave litigants vulnerable to a subsequent suit by the United States since the Government would not be bound by any determination reached in its absence. Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 371 n. 9 (1968); United States v. Candelaria, 271 U.S. 432 (1926). Insofar as the States' position would discourage or prevent tribes from litigating jointly with the United States, it would undercut the congressional objectives of "fostering tribal self-government," Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894, 902 n. 5 (1982), and promoting "maximum Indian participation . . . in the planning, conduct and administration of (federal) programs and services . . .

through the establishment of a meaningful Indian self-determination policy." 25 U.S.C. §450a; see, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 n. 10 (1980). Cf., Trbovich v. United Mineworkers, 404 U.S. 528 (1972), discussed in Special Master's 1979 Memorandum and Report at 12-14. See also, infra, at 24. And any litigation in which the United States purports to provide exclusive and complete representation to Indian tribes may also be subject to collateral attack if the Government's conflicts of interest result in a denial of the tribe's constitutional right to procedural due process. See, Hansberry v. Lee, 311 U.S. 32 (1940); United States v. Truckee-Carson Irrigation District, 649 F.2d 1286 (9th Cir. 1981). (Special Master's Report at 37, 52 n. 67, 54 n. 71.) Finally, assuming arguendo that tribes can take advantage of their relationship to the United States only when the United States declines to participate on their behalf, the States have not offered any reasons why this condition is not satisfied with respect to the Tribes' additional water

rights claims over and above the quantities sought by the United States.[12]

For all of these reasons, the Eleventh Amendment does not and should not bar the Tribes' intervention.

D. The Government's Representation of Indian Interests in Litigation is Neither Complete Nor Exclusive.

The States object to the Tribes' intervention in this case on the grounds that the Government's

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12 Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476, empowers tribes "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." This provision was expressly aimed at preventing disposition of tribal assets by federal officials. S. Rep. No. 1080, 73d Cong. 2d Sess. 1 (1934); 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974 at 657 (GPO 1979). As perfectly illustrated by this case, the absence of tribes from litigation in which their property rights are at issue might well result in the effective "disposition" of tribal assets by federal officials without tribal involvement or consent. See, United States v Winnebago Tribe of Nebraska, 542 F.2d 1002, 1004 n. 4 (8th Cir. 1976).

representation of tribal interests is "complete," citing the early case of Heckman v. United States, 224 U.S. 413 (1912). (States' Brief at 121, 127.)

Heckman held that Indian allottees are not necessary parties to a suit brought and prosecuted by the United States to enforce restrictions against alienation that had been violated by the Indians. Since the Government was charged by law with enforcing the restriction, which operated as a limitation on the Indians' control over their allotments, the Indians could not be allowed to intervene and take any inconsistent action. In this sense, the representation provided by the Government was said to be "complete". 224 U.S. at 444-45.

At the same time, the Heckman Court noted that the Executive Department has discretion to determine when the United States will undertake to provide representation to Indians and when the allottee "may be permitted to bring his own action, or, if so brought, (whether) the United States may aid him in its

conduct . . . ." 224 U.S. at 446. Thus, Heckman explicitly contemplates occasions in which the Government's representation would be supplemented by the Indians' separate and independent attorneys. More recently, after reviewing Heckman as well as subsequent decisions, the Court recognized that "the Indian's right to sue should not depend on the good judgment or zeal of a government attorney." Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 374 (1968). See, also, Trbovich v. United Mineworkers, 404 U.S. 528, 538-39 (1972). (Special Master's 1979 Memorandum and Report at 12-14.)

The factual setting of this case is very different from Heckman. The Tribes have intervened to support the claims of the United States and to assert that additional water rights are reserved for their benefit under federal law. Their intervention has been supported by the United States and there is no contention that representation of the Tribes by independent counsel is in any way inconsistent with the Government's statutory obligations. If the Government cannot prevent Indians

from suing, neither should it be permitted to exercise exclusive control over the extent and nature of the tribal claims asserted in the litigation or over the evidence submitted or arguments made in support of those claims.[13]

In the years since the Heckman decision, courts and the Government have become more cognizant of the limitations inherent in the Government's exclusive representation of Indian interests. In the 1934 Indian Reorganization Act, 48 Stat. 984, 987, 25 U.S.C. 8476, Congress determined that proper fulfillment of its trust required turning over to the Indians greater control of their own destinies.[14] "The overly paternalistic approach

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13 Given the choice, tribes might well opt against any litigation at all rather than a suit in which their meritorious claims are not presented by Government attorneys. See, United States v. Truckee-Carson Irrigation District, 649 F.2d 1286 (9th Cir. 1981), petitions for certiorari pending.

14 Several years earlier the Institute for Government Research in an extensive survey of the Indians' social and economic conditions noted the Government's problems in advocating the Indians' interests. Meriam, Problems of Indian Administration, 784 (1928).

of prior years had proved both exploitive and destructive of Indian interests." Morton v. Mancari, 417 U.S. 535, 553 (1974); See also, Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973); Fisher v. District Court, 424 U.S. 382, 387 (1976); Crowe v. Eastern Band of Cherokee Indians, 506 F.2d 1231, 1236 (4th Cir. 1974). The Indian Reorganization Act manifests a congressional intent to insure, or make possible, maximum Indian development and participation in all matters affecting the development and protection of their resources. These same policies are reflected in more recent legislation. See, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 n. 10 (1980).

The courts have also had occasion to comment on the inevitable clash between duty and expedience when Indian interests conflict with politically powerful elements of the dominant society. See, United States v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1956), cert. den., 352 U.S. 988, following remand, 330 F.2d 897 (9th Cir. 1964), rehearing den. with opinion,

338 F.2d 307 (9th Cir. 1964), cert. den., 381 U.S. 924; United States v. Truckee-Carson Irrigation District, 649 F.2d 1286 (9th Cir. 1981), petitions for certiorari pending; Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. FPC, 510 F.2d 198 (D.C. Cir. 1975); Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D.Or. 1977); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D. D.C. 1973).

The other branches of the Government have also recognized the difficulties with governmental representation of Indians. See, President Nixon's Message on Indian Affairs, 116 Cong. Rec. 23395, 23398 (1970); Subcommittee of Economy in Government of the Joint Economic Committee, Toward Economic Development for Native American Communities, 91 Cong. 1st Sess. (Comm. Print 1969) Vol. 2, 460-518; Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 92 Cong. 1st Sess. (Comm.

Print 1972) 1-3, 6; Chambers, A Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources, Id. at Vol. 1, 233-49.

Thus, all relevant experience subsequent to the 1912 Heckman decision has demonstrated to all three branches of government that federal officials cannot always be relied on to provide "complete" representation of Indian interests and that such officials are susceptible to political and other influences that undermine the quality and effectiveness of their advocacy.[15] See e.g., United States v. Truckee-Carson Irrigation District, 649 F.2d 1286, 1301 (9th Cir. 1981), petitions for certiorari pending; Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977); New Mexico v. Aamodt, 537 F.2d 1102, 1106 (10th Cir. 1976), cert. den., 429 U.S. 1121. Congress, the Executive branch and the courts have responded by

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15 As noted supra at 26, the Court in Heckman recognized that separate and joint representation would be appropriate in some instances.

authorizing, encouraging and making possible separate and independent representation of Indian tribes in litigation.

The Court should take cognizance of these realities. And its determinations should, to the maximum extent possible, reflect and implement Congress' contemporaneous Indian policies. Bryan v. Itasca County, 426 U.S. 373, 386-87, 388 n. 14 (1976); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 477-79 (1976).

In this case, following a thorough review of the record, the Special Master found that the Government's performance in the prior proceedings was deficient. (Special Master's Report at 46-52.) This finding, coupled with the manifest unfairness resulting to the Tribes, congressional policies promoting the Tribes' economic self-sufficiency and self-determination and preventing the loss of tribal property through the inadvertence, omissions or misconduct of Government officials, justified the Special Master's recommendations

that the Tribes be provided their own day in Court to assert their claims for sufficient water to irrigate all of their practicably irrigable acreage.

II. THE 1964 DECREE MAY BE MODIFIED TO ALLOW FOR ALLOCATION OF WATER FOR THE OMITTED LANDS UNDER ARTICLE IX OF THE DECREE.

The States contend that, in considering water rights for the omitted lands, the Special Master erred in concluding: (1) that Article IX of the 1964 Decree authorized reopening of the Tribes' reserved rights;[16] (2) that neither the principles of res judicata nor law of the case precluded such reconsideration; and (3) that failure to consider such claims would result in manifest injustice to the Tribes. (States' Brief at 23.) The Tribes submit that the Special Master's conclusions were correct with respect to all three issues.

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16 Article IX of the 1964 Decree provides: "Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy."

A. Article IX Empowers the Court to Modify the 1964 Decree and Grant the Claims for Omitted Lands.

The States admit that, on its face, Article IX "is expansive and provides seemingly unlimited authority for the Court to reopen, reconsider, revoke or modify previously litigated legal conclusions and factual findings." (States' Brief at 24.) They nonetheless insist that read in the context of the prior proceedings and the objective to establish with finality the scope of the Tribes' rights, Article IX precludes reexamination of such rights. (States Brief at 24.)

The lengthy history of this case does not support the States' narrow construction of Article IX. The filing of this case in 1952 presented the Court with a multitude of complex, unique and novel issues, which were subsequently referred to Former Master Rifkind for preliminary consideration. By admission of the States, consideration of the Indian claims before the Former

Master was then "secondary compared with the other issues." (States' Brief at 57.) This fact, coupled with the lack of definition of the Winters[17] doctrine, caused great confusion and uncertainty among the attorneys and the Former Master in determining the scope of Indian water rights.[18] It is not surprising then that the Former Master recommended, and this Court adopted, the broad language of Article IX to avoid "the possible claim that this Court may not alter or modify its rulings herein on the basis that the Decree is res judicata of the issues sought to be considered or reconsidered" as the Court "should not desire to find itself embarrassed by a provision in the Decree or ruling if the United States or parties can later convince this Court that this Court's

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17 Winters v. United States, 207 U.S. 564 (1908).

18 Numerous references of the States and Special Master to portions of the record of the earlier proceedings before the Former Master demonstrate the confusion of the participants. See, States' Brief at 25-26, Appendix A; Special Master's Report at 32-33.

determination has been erroneous or unworkable."[19] (Supplement and Amendment to Imperial Irrigation District's Form of "Decree of Court as Heretofore and Herewith Submitted" 11 (Dec. 1963) (emphasis added).) Article IX was not intended to create an "open-end" decree, but from its language it is apparent that the Former Master and the Court intended to retain jurisdiction to correct errors such as occurred in the prior proceedings.

Contrary to the States' view, redetermination of the Tribes' rights at this time, under these circumstances, is not inconsistent with the objective of

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19 This statement is the only reference in the original proceedings to the purpose of Article IX and supports the Master's conclusion that broad modifications were authorized. This conclusion the Special Master was quick to point out, "does not mean that any wide-ranging amendment would be made . . . Matters once litigated and decided should not be reconsidered absent some good reason. Such concerns, however, are addressed to the exercise of the Court's sound judgment rather than its power." Special Master's Report at 35 (emphasis in original).

finality. The Tribes' motions for modification of their rights under the 1964 Decree were filed in 1977 and 1978, well before the present perfected rights of the non-Indians were determined by the Supplemental Decree of January 9, 1979.[20] The Tribes' request for revision, then, came before any substantial degree of finality was obtained. Further, the rights of the Tribes themselves were not finally fixed by the 1964 Decree. Under Article II(D), modification was expressly authorized with respect to the Colorado River and Fort Mojave reservations in the event boundaries should become finally determined. And, comparable revisions, the States agree, were implicitly authorized under Article IX for the other three reservations. (Special Master's Report at 56 n. 73.) As noted above, the broad language

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20 The Tribes were awarded 905,496 acre feet of present perfected rights by the 1964 Decree, 376 U.S. 340. Under the Supplemental Decree of 1979, the non-Indian present perfected rights were fixed at 3,143,550 acre feet (excluding miscellaneous rights), 439 U.S. 419.

of Article IX was additionally inserted for the correction of substantial error in the prior proceedings. Thus, all parties were on notice that neither the rights of the Indians nor non-Indians were finally fixed by the 1964 Decree

The States would read Article IX narrowly "as a safety-net to provide a convenient means for dealing with matters not litigated below and dealt with in the Decree." (States' Brief at 32.) The rejoinder of the Special Master to one of the States' earlier constructions of Article IX[21] is equally applicable to that proposition:

[21] The States' position on the meaning of Article IX has changed considerably. The States previously contended that Article IX was limited "to correction of a genuine mistake of fact such as a mathematical miscalculation" but did not include a correction of mistakes of the kind under consideration here. (Special Master's Report at 34 n. 8.) The Special Master quickly disposed of that construction, noting that the inclusion of a "provision for the correction of merely clerical errors . . . would . . . seem entirely superfluous because a court normally possesses the inherent power to correct its decrees in such a manner." Id. at 34.) The States have also claimed that Article IX merely incorporated the normal aspects of res judicata. The Special Master properly rejected this construction as "unduly restrictive because it renders that provision almost meaningless." (Id. at 34.)

"Had the Court intended to impose the limits urged by the State Parties, the language might have been tailored to fit those limits." (Special Master's Report at 34.) But, of course, it has no such limitations. Under Article IX the Court expressly retained power "for the purpose of any modification of the decree . . . (it) deemed proper." (emphasis added). This language obviously encompasses Indians and non-Indians alike and authorizes amendments of any kind or character. Indeed, it was the very broad language of Article IX which the Special Master found most persuasive in arriving at his conclusion that the omitted lands claims are not foreclosed. (Id. at 33-34.)

Finally, as the Special Master observed, "this case has from the beginning involved a number of complex issues and difficult matters of proof. No one should be surprised that some mistakes occurred earlier. In fact, an absence of mistakes would have been reason for surprise. For just such a reason, water rights decrees often include retention of jurisdiction which may be used to adjust the water rights decreed in the event an error is

discovered." (Special Master's Report at 47.) Article IX, the Master concluded, should therefore be construed "consistent with similar provisions in other cases of this nature . . . to consider any mistakes which the Court might wish to correct. . . ." (Id. at 47.)

The States contend that the reference by the Special Master to similar provisions in prior interstate water dispute decrees is misplaced because those decrees were entered in equitable apportionment cases where each provision was to have addressed resolution of specific issues as expressed in the reports of the Masters. (States' Brief at 28-31.) Even though this is not an equitable apportionment case, the demonstrated use of such provisions to retain broad powers in other original jurisdiction water cases before this Court is the import. The fact that there is in this case no specific reference in Article IX or the Former Master's Report that would suggest a limitation in the application of Article IX enhances rather than detracts from the argument of a broad construction.

B. Neither the Principles of Res Judicata Nor the Doctrine of Law of the Case Preclude Consideration of the Omitted Lands Claims.

The States argue generally that res judicata bars reopening of the 1964 Decree but make no real argument (there is none) to rebutt the conclusion that the doctrine itself is inapplicable because the present motions were filed in the same rather than a different case.[22] Instead, the States insist that its underlying principles apply on two related grounds.

First, they argue that if reconsideration of the omitted lands claims is permitted, "the door is inexorably opened to continued relitigation of the practicably irrigable acreage issue" whenever technological innovations demonstrate that additional reservation lands have become practicably irrigable.[23]

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22 See, Special Master's Report at 31.

23 The States confuse the grounds for reopening a decree with the standards to be applied once a decision to reopen has been made. Special Master's Report at 98.

(States' Brief at 36-37.) The Special Master expressly rejected "changed circumstances, such as new technology regarding irrigability" as grounds for altering the Decree. (Special Master's Report at 35.) He was careful to specify that modification of a decree is not advisable "absent some good reason," (Id. at 35) as here where it is demonstrated that there was clear error in the earlier proceeding resulting in "manifest injustice." (Id. at 36.) If those proceedings and the resulting decree were fair at that time, subsequent changes in technology, regardless of how they might advance the interests of a party were they heard today, are not grounds for modification.

Second, the States maintain that in rejecting the finality principles of res judicata, the Special Master failed to provide an alternative rule which would specify "when and in what circumstances 'enough is enough'." (States' Brief at 37.) The States are wrong. The Special Master explicitly agreed that "the 1964 Decree would have no meaning if it is not accorded some degree of finality" and concluded that the applicable concept for

determining the proper degree of finality was the doctrine of law of the case. (Special Master's Report at 35.) That doctrine, he noted, "differs from res judicata because the latter compels adherence to a prior decision while the former merely directs the Court's discretion. It is a matter of good practice, not a limitation on the Court's power." (Id. at 36.) Applying the law of the case doctrine, the Special Master weighed two factors in determining whether a prior holding may be modified, namely: (1) the justifiable reliance of the parties, and (2) whether the prior holding was clearly erroneous and would work a manifest injustice. (Id. at 36.)

Initially the Special Master acknowledged that "the detrimental impact on (the State) Parties by such an amendment cannot be seriously denied. What the Tribes gain someone else will lose . . . . But the present inquiry centers upon detrimental reliance rather than impact." (Id. at 38) (emphasis added). It is not hard to understand why the Master found "it difficult to determine from the testimony exactly what significant,

different action the State Parties would actually have taken if the Indian reservations had received in 1964 the water rights now requested." (Id. at 46.) The States refer us to no evidence showing that they would have done anything differently had the Tribes received their full entitlement in 1964. Arizona certainly does not claim it would have foregone the Central Arizona Project. The Metropolitan Water District implies, but points to no evidence, that it would have requested more water from the California State Water Project. (States' Brief at 47-50.) The fact is that the Metropolitan Water District after 1964 sought only to replenish the water it lost to Arizona and simply ignored the water the Tribes were awarded. (Special Master's Report at 42-43.) And, Nevada can make no claim of reliance whatsoever. It got confused between diversion and consumption and misread the 1964 Decree as having awarded the Fort Mojaves even more water than they now claim. (Id. at 44-45.)

In short, upon examination, the States' "evidence" of detrimental reliance vanishes. The Master,

nonetheless, gave them the benefit of the doubt, generously concluding that "not a great deal of evidence is really needed to convince anyone that western states would rely upon water adjudications." (Id. at 46.) But, with no significant evidence of detrimental reliance before him, the Master concluded that the manifest injustice to the Tribes in foreclosing their claims outweighed the States' nebulous general reliance and that the claims should therefore be considered. (Id. at 47.)[24]

The States agree that under the law of the case doctrine the evidence of a "grave injustice" is a traditional ground for reconsideration of the Tribes' omitted lands claims. (States' Brief at 38; compare Special Master's Report at 36.) The cases cited by the States and the Special Master require as a ground for

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[24] The Reply Brief for the United States to the States' Exceptions demonstrates in detail the utter failure of the States to prove that they took or failed to take any action as a result of their reliance upon the 1964 Decree and is hereby adopted by the Tribes.

reconsideration clear error in the earlier decision as well as a grave or manifest injustice. Apparently the States concede that there was clear error in the initial proceedings. The States do, however, deny that barring the ommitted lands claims would, in fact, work a grave injustice. (States' Brief at 38-39.) According to the States, the Tribes in the earlier proceedings were awarded their full entitlement of rights in conformance with the standards then employed and evidence there introduced. Therefore, barring their omitted lands claims would not work an injustice because the Tribes have already had one full and fair hearing. (States' Brief at 41-43.)[25]

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25 In the same vein, the States contend that the omitted lands were not really omitted but rather "rejected" because "the United States actually determined in the prior proceedings that (such) lands were not practicably irrigable." States' Brief at 42. How this distinction has any bearing upon the question of fairness of the prior proceeding the States do not reveal. The injury to the Tribes is the same in either case. But in any event, the States are demonstrably in error.

This was not the States' position before the Special Master. As he noted, "One of the few aspects . . . that has drawn agreement among the parties is the existence of irrigable lands which were 'omitted' from the claim for water rights in the earlier proceedings. (The States) admit that the large majority of omitted lands for which water rights are claimed by the United States are practicably irrigable." (Special Master's Report at 47; see also, Stipulation of September 8, 1980, record item no. 91.)

Beyond that, the States themselves are apparently unsure as to whether the Government believed the omitted lands were practicably irrigable in the original proceedings. At one point, they contend that the omitted lands were not claimed because the Government did not believe the lands to be practicably irrigable. (Special Master's Report at 42.) Later, they characterize the Government's failure to claim water for such lands as a "reasoned tactical decision." (States' Brief at 43.) The States cannot have it both ways. Either the Government

knew the lands were irrigable but nonetheless declined to claim them, or it mistakenly believed they were non-irrigable. The former explanation appears unlikely in light of the Government's failure to claim almost one-half of the practicably irrigable lands on the Chemehuevi Reservation,[26] one-sixth of such lands on the Cocopah Reservation, and a grand total of almost 20,000 acres on all five reservations.[27]

Such horrendous gaps in proof cannot be explained let alone justified by a "reasoned tactical decision." Trial tactics might excuse failure to claim

26 Special Master's Report at 192-96. By the 1964 Decree, the Cocopahs were awarded water sufficient to irrigate 431 acres. The Special Master recommended that they receive additional water sufficient to irrigate 1,170 acres including 71 acres of omitted lands. Id. at 196, 281. The States agree with the Special Master that 1,593 of these 1,170 acres are practicably irrigable. States' Brief at 6.

27 By the 1964 Decree, the Chemehuevis were awarded water sufficient to irrigate 1,900 acres. The Special Master recommended that they receive additional water sufficient to irrigate 1,621 acres. Although percentage-wise the magnitude of the Government's dereliction on the larger reservations was smaller, in terms of the actual number of acres omitted, it was vastly greater.

small areas of truly marginal land, but to permanently restrict the water rights of an Indian tribe in the arid desert of the Southwest to half of its entitlement cannot be justified as trial strategy. Whether intentional or unintentional, the fact remains clear that the Tribes were inadequately represented.[28]

The federal reserved water rights of Indian tribes are held in trust by the United States for the benefit of the Indians and, thus, are governmental rights. In the instant case such rights will be lost if the omitted lands claims are precluded, due to the inadequacy of the Government's representation in the initial proceeding. This Court has long held impermissible these types of losses:

> . . . (A)ssuming that Government agencies have been negligent in failing to recognize or

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[28] As the Special Master stated, "I cannot imagine any legitimate reason . . . that would cause the United States to present less than the maximum claims" which they could in good faith make on behalf of the Tribes. Special Master's Report at 52 (emphasis added); see also, Id. at 52 n. 67.

> assert the claims of the Government at an earlier date, the great interests of the Government . . . are not to be forfeited as a result. The Government which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

United States v. California, 332 U.S. 19, 39-40; see also, Cramer v. United States, 261 U.S. 219, 234 (1923); Utah Power and Light Co. v. United States, 243 U.S. 389 (1916); United States Immigration and Naturalization Service v. Hibi, 414 U.S. 5 (1973).

Preclusion of the omitted lands claims due to the failures of the Government's representatives at the prior hearings would also be inconsistent with Section 16 of the Indian Reorganization Act, 48 Stat. 984, 987, 25 U.S.C. §476, prohibiting the disposition of tribal interests without the consent of the tribe, as well as the Indian

Non-Intercourse Act, 25 U.S.C. §177, which prohibits the disposition of Indian interests without the consent of Congress.

Notwithstanding the absolute necessity of adequate water for the reservations, the States attempt to justify preclusion of the omitted lands claims on the ground that there is no evidence to show that rejecting them would "frustrate the purposes of the reservations," or jeopardize the Tribes' ability to meet their "reasonable needs." (States' Brief at 39-40.) Again the States overlook the record, which establishes that barring such claims would unquestionably "frustrate the purposes of the reservations" and jeopardize the Tribes' ability to meet their "reasonable needs."

The evidence pertaining to the smaller reservations is particularly persuasive. The Cocopah Tribe, for example, has 460 members living on the reservation. (Tr. at 1424.) By the 1964 Decree the Cocopahs were only awarded enough water to irrigate 431

acres, or less than an acre per member. The average-sized farm in Arizona, however, is 501 acres.[29] The irrigable acreage ratios on the Chemehuevi and Quechan Reservations under the 1964 Decree are of similar magnitude - 4 plus acres per capita.[30] And, although the ratios on the Fort Mojave and Colorado River Indian reservations are somewhat higher, satisfaction of their "reasonable needs" would likewise be jeopardized if restricted to their 1964 rights.[31] This point was recently

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29 Farm Numbers, Statistical Reporting Service, U.S. Dept. of Agriculture (Dec. 28, 1981).

30 There are slightly more than 400 members of the Chemeheuvi Tribe. Tr. at 1433. By the 1964 Decree, the Chemehuevis were awarded water sufficient to irrigate 1,900 acres - 4 plus acres per capita.

There are 1,700 members of the Quechan Tribe. Tr. at 1455. By the 1964 Decree, the Quechans were allocated the water required to irrigate 7,743 acres - 4 plus acres per capita.

31 There are 723 members of the Mojave Tribe. Tr. at 1383. By the 1964 Decree the Mojaves were granted the water necessary to irrigate 18,974 acres or 26 plus acres per capita.

There are 2,300 members of the Colorado River Indian Tribes. By the 1964 Decree, the Tribes were awarded water sufficient to irrigate 107,588 acres or 40 plus acres per capita.

demonstrated by the House of Representatives. On May 6, 1982, it passed H.R. 5539, which increased from 160 to 960 the acreage ownership limitation on farms eligible to receive federal reclamation waters on the ground that farmers could not make a living on 160 acres.[32] If it takes 960 irrigable acres for a non-Indian farmer to make a living, an Indian farmer on one of the five reservations cannot be expected to make a living on a tiny fraction of such acreage.

The Court's own opinion in this case recognizes that Colorado River water is the sine qua non of life on these reservations:

> Most of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most

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[32] H.R. Rep. No. 458, 97th Cong., 2d Sess., House Committee on Interior and Insular Affairs, March 15, 1982 on H.R. 5539.

> desirable area of the Nation. It is impossible to believe that when Congress created the Great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind - hot, scorching sand, - and that water from the river would be essential to life of the Indian people and to the animals they hunted and the crops they raised. 373 U.S. 598-599.

The Government's failure, we submit, to claim water for these "hot, scorching sands" - for whatever reason - was manifestly unjust to the Tribes and should now be corrected under Article IX of the Decree.[33]

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[33] Having determined that consideration of the omitted lands claims was authorized by Article IX, the Special Master found it unnecessary to rule on the Tribes' argument that the Government's conflict of interest in the prior proceedings prevented preclusion of such claims. Special Master's Report at 54. Should the Court conclude that consideration of the ommitted lands claims is not authorized by Article IX, the latter issue should be remanded for hearing and recommendation by the Special Master.

III. THE SPECIAL MASTER PROPERLY CONCLUDED THAT THE BOUNDARIES OF THE RESERVATIONS ARE "FINALLY DETERMINED".

The States except to the Special Master's finding that certain boundaries of the reservations are "finally determined" under the 1964 Decree. The Tribes challenge the States' Exception and request this Court to adopt the Special Master's findings and award the additional present perfected rights claimed by the Tribes for practicably irrigable lands found to be within the reservations as a result of boundaries being finally determined. In reply to the States' Exception and in support of their claims, the Tribes hereby adopt the argument of the United States pertaining to such claims, as set forth in the Reply Brief for the United States.

IV. THE SPECIAL MASTER PROPERLY DETERMINED THE NUMBER OF PRACTICABLY IRRIGABLE ACRES ON EACH RESERVATION.

A. The Tribes' Analysis and Findings of the Special Master Were Proper.

The United States retained experts to analyze the irrigability of reservation lands. They concluded that substantial amounts of land were practicably irrigable but were not included in the prior Decree (hereinafter "United States' claims"). The Tribes also retained experts to analyze the reservation lands. Although the Tribes agreed generally with the United States' claims, they concluded that there were additional lands which were practicably irrigable and not claimed by the Government (hereinafter "tribal claims").

The parties approached the evaluation of the lands somewhat differently. The Tribes' experts defined practicably irrigable land on the basis of a plan for development over a period of twenty to thirty years, commensurate with the financial capabilities of the Tribes. (Tr. at 6500.) The States by contrast evaluated

the lands in terms of whether a prudent farmer would now decide that it would be profitable or unprofitable to develop his land. (Tr. at 46.) The tribal claims are based upon the planting of permanent tree and vine crops in conjunction with traditional field and row crops such as alfalfa and cotton. (Tr. at 6500.) The States from the outset rejected the concept of permanent crops for the reason that a prudent man would not risk his money on permanent crops with no commercial history in the area. (Tr. at 50.) We contend that the immediacy of the investment question with which the States approached the problem was wrong in that it tended to ignore the future needs of the Tribes for which water was to be reserved. Arizona v. California, 373 U.S. 546, 600 (1963).

Permanent tree and vine crops take more time and money to establish but typically generate a higher return than do field crops. (Tr. at 1058.) The lands covered by the tribal claims are generally higher above or farther from the river than the United States' claims and the cost of getting water to them is therefore

greater. The traditional field and row crops will not generate enough income to pay for irrigating these higher lands. The Tribes' experts investigated several permanent crops which grew in similar environments to see whether they would grow on the Colorado River and whether they would be economically feasible there. (Tr. at 1049.) Costs of growing the crops and income to be realized were then projected and compared to determine whether a given crop would be profitable. (Tr. at 1050-1052.) If this analysis indicated that the growing of a crop was profitable, or economically feasible, on certain land, that land was designated as practicably irrigable and included in the tribal claims.

The Tribes' experts came to the conclusion that pistachios, figs, almonds and table grapes could be grown profitably on various parts of the reservations which had not been designated practicably irrigable in the earlier proceeding. The States continue to contend that no permanent crops can be grown profitably on the reservations and deny every acre of the tribal claims.

The Special Master determined that some parcels of land claimed to be practicably irrigable by the Tribes were non-arable, that is, not suitable for the commercial production of any of the proposed crops. The reasons included flooding, high water tables, irregularity of boundaries, rough or steep topography, etc. (Special Master's Report at 252, 261, 268, 271.) The Special Master rejected the Tribes' claims that pistachios would grow in the lower Colorado River area and did not consider them in evaluating the irrigability. (Special Master's Report at 203.) The Special Master did accept our contention that figs were suitable and would grow. He decided, however, that the yield to be expected from figs was lower than we contended and that the income would not be enough to cover the cost of getting water to the land. He therefore rejected figs as unprofitable. (Special Master's Report at 221.) The Special Master determined that almonds, on the other hand, woud grow and would be profitable on all the lands covered by the tribal claims. (Special Master's Report at 217-218.) He

concluded that grapes clearly would also be a feasible and profitable crop on the tribal lands. (Special Master's Report at 221.)

The elimination of two of the permanent crops projected by the Tribes does not defeat any part of our claim of practicable irrigability. While a cropping pattern including figs and pistachios was assumed on some of the land, this was for calculation and projection purposes. It was pointed out by the Tribes' experts that, based upon market factors and other conditions over the twenty or thirty year development period, actual planting patterns could be different and different crops might prove to be more advantageous. (Tr. at 7111-7113.) The Special Master decided that the practicable irrigability of land was shown by proving its ability to support almonds or grapes, or any crop, even though different crops or no crops might ultimately be grown on it. (Special Master's Report at 273.)

The experts for both sides analyzed the amount of practicably irrigable land on the basis of

current prices, costs and technology. The Special Master decided that the only sensible way to determine practicable irrigability was to use present standards. Once the decision to reopen the 1964 Decree is made, the reference to past standards would add complications to an already complex case. (Special Master's Report at 98.)

The State of Arizona took exception to the Special Master's refusal to apply technology as of the time the reservations were created. (Arizona Brief at 36.) No other exceptions to the use of current data and technology were made. Ignoring known changes and analyzing the irrigability of the Colorado River Reservation in 1865, for example, would be a totally unrealistic way to deal with the present and future needs of the Indians. The Special Master considered the difficulty and unreliability of inquiring into nineteenth century technology in reaching his decision to consider current information. (Special Master's Report at 98 n. 24.)

B. State's Exceptions Are Unsupported By the Record.

1. Bias. The States see a double standard and predisposition against them in the Special Master's failure to agree with their experts on all points. The Special Master did not accept fully the contentions of any party and the unseemly charge that he was prejudiced is totally refuted by the facts and the thorough analysis set forth in the Special Master's Report.

In some cases the Special Master rejected contentions of the Tribes which were supported by strong evidence. For example, pistachios were rejected because the Special Master decided that there were not enough chilling hours in winter on the reservations. (Special Master's Report at 198.) There was much conflicting technical and theoretical evidence on just what chilling hours were, their impact, how they should be measured, etc. We thought that the theoretical questions were resolved by our showing that there were

the same number of chilling hours along the Colorado River as at Bakersfield, California, where pistachios are successfully grown. The Special Master disregarded that uncontradicted evidence because it "simply fails to convince" him. (Special Master's Report at 199.) We thought that the scientific dispute over the suitability of pistachios was resolved by the undisputed fact that pistachios are grown, and very high yields are achieved, only fifty miles to the east of the reservations in Wenden, Arizona. (Tr. at 6212-6213.) The Special Master disposed of that item by ignoring it. The Tribes also contended that the appropriate almond yield was 2,750 pounds per acre and the States claimed that 2,000 pounds per acre was correct. The Special Master observed that, "Neither side appears to be completely correct" and that "(t)he truth, I believe, lies between the figures advocated by the litigants." He then adopted the rock-bottom 2,000 pound figure presented by the States. (Special Master's Report at 207, 208, 212, 214.) Such subjective determinations by the Special Master hardly indicate the predisposition toward the Tribes perceived by the States.

Some testimony was so weak that it was not only unworthy of consideration itself, but cast doubt upon the credibility of the States' claims in general. For instance, one State expert testified that a certain 1,600 acre parcel of reservation land should be classified as non-arable. He said that he based this conclusion on a "very rough look" and that he had "just made a figure out of the air." (Tr. at 3091, 3392.) It did not require bias for the Special Master to cast such testimony aside. (Special Master's Report at 272.)

The States cite the Special Master's failure to accept their grape prices as the most egregious and prejudicial example of his double standard. (States' Brief at 84.) As set forth in more detail below, the States' grape price contentions were based on a nonexistent "Arizona market" and an exhibit (States' Exhibit 184) which was sharply criticized and totally rejected by the Special Master.

2. Consideration of Permanent Crops. In the early stages of the hearing the States objected to the

very concept of considering permanent crops in evaluating the practicability of irrigation. The reason given was their conclusion that a prudent man would not risk his money on permanent crops with no commercial history in the area. (Tr. at 50.) They have retreated from that position. The States refer to the failure of the United States' expert economist to consider permanent crops. They do, however, adopt that expert's statement that the fact that crops have not been grown extensively in an area does not necessarily mean that they cannot be grown economically, but that lack of present crop history does raise a question about economic viability. (States' Brief at 96; Tr. at 769.) The States then concede that consideration of permanent crops was not "wrong per se" but caution that "great care must be taken in reaching any conclusion regarding profitability." (States' Brief at 97-98.) We agree, that is exactly what has been done. Great care was used by the Tribes' experts in compiling and analyzing much data, as described in the reports (Exhibits CH-1, CR-1, FM-2, FY-19), in the individual

exhibits, and in the testimony of many witnesses over a period of several weeks. The Tribes' experienced engineering expert knew of no agricultural analysis with the depth and detail of this one. (Tr. at 6501-02.) The Special Master's Report itself shows the meticulous attention devoted by him to all the evidence. After much consideration, the Special Master came to the conclusion that some of the land claimed was practicably irrigable and some was not. The Special Master certainly met the States' "great care" standard and his findings should not be disturbed on the grounds that he considered permanent crops.

3. Market Impact. The States suggest that the projected plantings of almonds and grapes on the reservations would create a glut on the market which would destroy the present price structure. They then admit that this would not be a major problem with almonds because the almond market is big enough to absorb some increases in acreage without a major effect on prices. (States' Brief at 107.) There are 357,000 acres

of almonds under cultivation and this is increasing at from 7,000 to 12,000 acres per year. (Tr. at 1334.) If the Tribes planted 5,000 acres of almonds over twenty years, the 250 acre annual increase would be insignificant. (Tr. at 1333-1334.) The suggested almond glut due to reservation plantings is thus not a matter for concern.

There were 95,000 acres of table grapes under cultivation in California and Arizona in 1979 and the annual increase is 2,000 to 2,500 acres. (Tr. at 1334.) If, as suggested by the States, 10,000 reservation acres are planted in grapes, the average increase over twenty years would be 500 acres per year. This would be only a 1/2 of 1% annual increase in the total acreage. Table grapes are very profitable (Tr. at 1871-72, 4825, 5559), and there is no evidence that such a small increase in supply would be disruptive to the market structure. The "small Arizona grape market" upon which the States predicate their grape glut (States' Brief at 108) simply does not exist. Reservation grapes would be part of the overall Arizona and California market. (Special Master's Report at 237.)

4. Almond Prices and Yields. The States take exception to the Special Master's use of a three year average price for almonds. This was not the price proposed by either party but was based upon firm data and arrived at by the Special Master in accordance with the method prescribed by the States' expert. (Tr. at 4083.) The Special Master used the payment capacity calculation method prescribed by the States and came to the conclusion that almonds are economically feasible. (Special Master's Report at 216-217.)

5. Grape Prices and Yields. Nothing in this case is more clear than that the table grape business is a very profitable one (Tr. at 1871, 4825, 5559) and that grapes would be profitable on the reservations. Even the 4.4 ton per acre yield projected by the States exceeds the 3.85 ton yield at which grapes are profitable. (Exhibit FY-43.) The Special Master recognized that actual yields would be higher (Special Master's Report at 238), and yields up to 8.6 tons were acknowledged by the States. (Tr. at 7238.) The $867 per ton price used by the Special

Master was very conservative in comparison with the $955 Arizona price (Exhibit CR-56; Tr. at 7240), and the $1,364 Coachella price (Tr. at 5559). On the grape issue the States resorted to a last minute exhibit (Exhibit SP-184) which contained incomplete and unexplained statistics selected by their experts. The exhibit, if believed, would mean that grapes are generally unprofitable and that just is not so. The Special Master considered Exhibit SP-184 at length and stated that it was confusing, virtually meaningless, based upon assumptions not in the record and unpersuasive. He rejected it as misleading and refused to consider it for any aspect of the case. He said the use of such an exhibit created serious doubt about the credibility of the States' claim. (Special Master's Report at 225, 228, 229, 235.)

C. Large Portions of Lands for Which Allocation of Water Is Sought by the Tribes Are Admittedly Practicably Irrigable.

The arguments about the amount of practicably irrigable acreage do not pertain to the United

States' claims on the Colorado River Indian Reservation because they are stipulated. The United States, on behalf of the Colorado River Indian Tribes, claimed that 23,145 gross acres of land on their reservation was practicably irrigable but was not included in the prior Decree. The response of the States' experts was that 20,471 acres of the United States' claims were practicably irrigable. (States' Exhibit 26-Table 1.) The Colorado River Indian Tribes joined with the United States in its claim and asserted their own claim that an additional 8,662 acres were practicably irrigable. (Exhibit CR-1, Table A-2.) The parties stipulated that 21,634 of the acres covered by the United States' claim are practicably irrigable. (Stipulation, Sept. 8, 1980, record item no. 91.)

The States concede that over eighty per cent of all omitted lands claimed by the United States is practicably irrigable. (See, Special Master's Report at 106-111.) Although the States deny that virtually all of the omitted lands claimed by the Tribes beyond the Government's claims are practicably irrigable, they do

concede that over fifty per cent of the omitted lands claimed by the Tribes and the United States together are practicably irrigable. We submit that the States admissions illustrate the injustice resulting from the first proceeding that should now be corrected. This correction should not be limited to that acreage which is beyond question and therefore agreed to by the States. It ought to extend to all acreage which is in fact practicably irrigable, as determined by the Special Master in this case.

CONCLUSION

All Exceptions of the States to the Special Master's Report should be rejected. Except as specified in the Exceptions of the United States and Supporting Memorandum, to which the Tribes fully concurred, the recommendations made in the Special Master's Report should be approved and the proposed Decree entered by the Court.

Respectfully submitted,

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No. 8, Original

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants,

THE UNITED STATES OF AMERICA AND STATE OF NEVADA,

Interveners,

STATE OF UTAH AND STATE OF NEW MEXICO,

Impleaded Defendants,

COLORADO RIVER INDIAN TRIBES, FORT MOJAVE INDIAN TRIBE, CHEMEHUEVI INDIAN TRIBE, COCOPAH INDIAN TRIBE, AND FORT YUMA (QUECHAN) INDIAN TRIBE,

Recommended Interveners.

Separate Response of the Quechan Tribe to the Exceptions Asserted by the State Parties, et al. to the Special Master's Report Dated February 22, 1982, and Brief in Support Thereof.

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TABLE OF CONTENTS

Page

Separate Response of the Quechan Tribe to the Exceptions Asserted by the State Parties, et al. to the Special Master's Report dated February 22, 1982, and Brief in Support Thereof 1

Introduction 2

Argument 3

I.

Conflict of Interest 3

A. Objective Evaluation Is Made Difficult 5

B. The "Conflict of Interest" Issue Is Still Relevant 7

C. The Indians Initiated These Hearings 8

II.

The Special Master's Classification of the Practicably Irrigable Lands North of the All American Canal Is Supported by the Weight of the Evidence 11

III.

The Boundaries of the Respective Indian Reservations Have Been "Finally Determined" 32

A. The Allegation of Unilateral Action 34

B. State Parties Not Privy to Action 37

C. Need for Court Adjudication 39

Conclusion 41

Appendix A. Grape Calculations Using Bozick's 300 Lug Yield and Bozick's Prices ..... App. p. 1

Grape Calculations Using Bozick's 300 Lug Yield, Bozick's Prices, and 25% Increased Pre-Harvest Cost .. 2

Grape Calculations Using Maddock's Price of $869/Ton 3

TABLE OF AUTHORITIES

Cases	Page
Arizona v. California, 373 U.S. 546, 10 L. Ed. 2d 542 (1963)	39
Cragin v. Powell, 128 U.S. 691, 697-699 (1888)	34
Fort Mojave Tribe v. LaFollette, (D. Ariz. Civ. 69-324 MR)	39
Heckman v. United States, (1912) 224 U.S. 413, 445-46, 32 S. Ct. at 434-35	11
Johanson v. Washington, 190 U.S. 179, 185 (1903)	34
Knight v. United States Land Association, 142 U.S. 161, 177-178 (1891)	34
Lane v. Darlington, 249 U.S. 331, 333 (1919)	34
Seminole Nation v. United States, (1942) 316 U.S. 286, 62 S. Ct. 1049, 86 L. Ed. 1480	11
Trbovich v. United Mine Workers, (1972) 404 U.S. 528, 30 L. Ed. 2d 686, 92 S. Ct. 630	11
United States v. Reimann, 504 F. 2d 135, 138 (10th Circ. 1974)	34
United States v. Schurz, 102 U.S. 378, 395 (1880)	34
United States v. State Investment Company, 264 U.S. 206 (1924)	34

Statutes	
25 USC 176	33
43 USC 751	33
43 USC 752	33
43 USC 772	33

Textbook	
1 Kappler, Indian Affairs	35

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Recommended Interveners.

Separate Response of the Quechan Tribe to the Exceptions Asserted by the State Parties, et al. to the Special Master's Report Dated February 22, 1982, and Brief in Support Thereof.

INTRODUCTION.

The Quechan Tribe is filing this Separate Response because there are certain aspects of the case at bar which have a unique application to their reservation. The five Indian tribes have filed a joint Response to the Exceptions to the Special Master's Report, and the Quechan Tribe completely concurs in the joint Response, but submits this Separate Response because it believes that such an addition will be of assistance to the Court.

ARGUMENT.

I.

CONFLICT OF INTEREST.

At the outset, an important observation must be mentioned regarding the truly unfair and unwarranted attack upon Special Master Tuttle by the State parties, et al. In making their attack they are conveniently forgetting vital facts that precipitated these somewhat belated hearings for a full presentation of the Indian claims. Proof positive of this is made quite clear when one simply reads their accusation that:

> "The most singular fact about the Indian Tribes' claims is that the Special Master has found 15,403 net acres practicably irrigable (and has awarded 102,072 acre-feet of diversion rights) (Spec. Master's Rep., pp. 254, 266, 274, 277) *not even claimed by the United States*. For years, the United States has been criticized by these five lower Colorado River Indian Tribes for its alleged failure to represent them adequately at the original trial of this matter before Special Master Rifkind in the late 1950's. Faced with this criticism, *the United States initiated the current proceedings in late 1978* in order to assert additional water rights claims on behalf of the Tribes and was undoubtedly *motivated to assert the maximum claims reasonably possible* in order to justify its conduct as trustee. Under such circumstances, *it is incredible* to imagine that the United States and its experts could have been so unprincipled or so incompetent as to fail to assert the practicable irrigability of these 15,403 net acres recommended for water rights by the Master.
>
> "And yet the Master's finding necessarily implies exactly that since it recognizes almost 50% more acreage as practicably irrigable than was claimed by the United

States." (Emphasis ours) Pp. 94 and 98 of Exceptions by State parties, et al.

This statement makes it easy to realize that the State parties, rather than address the facts, are attempting to discredit the Special Master, particularly when they go on to describe his recommendations as "incredible" and "astounding". In other words, they would like to have this Court believe that he must be "unfair" since, as they argue, there is really no "conflict of interest" between the United States and the Indian tribes. On the other hand, the reality of this conflict did not elude the Special Master who announced his awareness of it on August 28, 1979, on Page II of his Memorandum and Report on Preliminary Issues when he said:

> "There nevertheless remain differences between the interests of the United States and those of the Indian tribes. Most noticeable is the difference in their claims. The claim by the United States was not filed until after the Tribes had already moved to intervene and complained of delay by the United States in claiming on their behalfs. At least in their pleadings, the United States and the Tribes claim significantly different amounts of irrigable acreage. See note 6, supra. To the extent of these differences the Indian claims are not actually represented."

In other words, Special Master Tuttle commenced the Indian evidentiary hearing with a total awareness of the fact that the positions of the United States and the Tribes were quite different. On the other hand, the State parties have apparently subscribed to the idea that the trustee's position should be the same as that of the beneficiary. To this the Indians would merely remark that such should be the case when there is no conflict of interest, but when the United

States also has a duty to deliver water to their opposition pursuant to contracts made by the Secretary of the Interior and other areas of conflict the situation is markedly different.

A. Objective Evaluation Is Made Difficult.

In the instant case the task of determining the factual truth when attempting to evaluate the evidence record which has been presented by the United States, as trustee, and that by the Indian beneficiaries is most difficult when one realizes that the trustee has a conflict of interest. In other words, when evidence is presented by the State parties which is in conflict with that of the Indians, it is easy to realize that this is the result of their adversary positions, but the obvious duty of the United States, as trustee, "to advance the interests of the beneficiaries of the trust without reservation" poses a serious question when from the evidence it appears that the trustee is less than supportive of the Indians and in harmony with the State parties. (Message from the President of the United States transmitting recommendations for Indian policy, July 8, 1970, in hearings before the subcommittee of Administrative Practice and Procedure, October 19 and 20, 1971, Page 226).

Of particular importance here is the fact that is apparent from an examination of the record in the instant case that we have a striking difference between the claims asserted by the United States and those asserted by the Quechan Indians. For instance, in its final submission of evidence, the United States refused to make any claim whatsoever for water to irrigate the Quechan lands north of the All American Canal. Further, the United States repeatedly refused to modify its position to lend support to the Quechan claims, despite the expert testimony given at the trial in support thereof. In fact, the record also reveals that in this area the United States even rejected its own evidence favoring the

Quechans, and retreated to a point which could only give aid and comfort to the State parties. This is appreciated by reference to the record.

In the written Rifkind Hearings, the United States told the Court that it was going to claim "all" of the irrigable lands. (Rifkind Hearings, 12452-12453, 12455, 12460, 12463). However, upon being questioned by Special Master Rifkind, they admitted that they were presenting evidence of something less. (Rifkind Hearings, 14155).

In our recent hearing in Denver we learned that the earlier claim by the United States for less than the Indian entitlement was a deliberate abdication of trust responsibility. Jim Jones, as an agent for the Bureau of Indian Affairs, explained that he had been assigned in 1955 to the Irrigation Map Team and given the job of mapping the Quechans' "irrigable acres" at Yuma south of the All American Canal. (TR 1X, 1604). He mapped some 4800 irrigable acres of lands that the United States was not claiming. (TR 1X, 1604-1605). While these lands were being administered by BLM under a reclamation withdrawal at that time, the Bureau of Indian Affairs considered them to be part of the Quechan Reservation. (TR 1X, 1007).

The United States, faced with such a conflict between these agencies, simply ignored Jone's report and only asserted the smaller 1904 Yuma Project figure of 7,743 acres. These are part of the lands now reaffirmed as part of the Quechan Reservation. The United States failed in the Rifkind Hearings to consider the true extent of the Quechan Reservation and thereby failed to claim the amount of water to which the Quechan Indians would have legally been entitled. Furthermore, this failure by the trustee for the Indians to claim "all" of the water that belonged to them makes it easy to understand why the United States also hid behind the attorney client-privilege during the Denver hearings to

make certain that the testimony of another witness called by the Quechans, Charles P. Corke, was excluded. (TR VIII, 1514, *et seq.*).

B. The "Conflict of Interest" Issue Is Still Relevant.

Now that the Indians have had their day in court with independent legal representation one can logically ask if the "conflict of interest" issue is still significant. The Quechans offer an unequivocal answer in the affirmative, and they hasten to note that in evaluating the evidence presented by the United States and the Indians, one must do so with an awareness of the same old conflict of interest issue since its persistence has impeded the United States as trustee. In the Rifkind Hearings the conflict of interest kept the United States from asserting a full and complete claim for the Quechan Indians south of the All American Canal.

In the current hearings their position clearly has remained about the same. In our most recent hearings the United States has attempted to exhibit an aggressive effort on behalf of the Quechans respecting their irrigable lands south of the All American Canal by admitting that they were wrong during the first hearings. On the other hand, they have adhered to their original policy by rejecting their own evidence regarding the irrigability of the lands north of the All American Canal. On this point the record speaks. The United States hired Earth Environmental Consultants in 1975 to determine the irrigable acres of land on the Quechan Reservation. Before making that contract the concerned parties were careful to ascertain they they had hired outstanding experts. These experts located thousands of irrigable acres in the Araz Wash area north of the All American Canal. The United States thereafter accepted their conclusion. In fact, Mr. Kersich, one of the expert engineers for the United States, made irrigation system studies respecting

this land because Doctor Stoneman, a soils expert of the United States, had found 3,540 irrigable acres north of the All American Canal. In addition, Dr. Kleinman, the economic expert employed by the United States, also reported a positive payment capacity for those irrigable acres north of the All American Canal. Then, in early 1980, the United States resorted to type — a trustee beset by a conflict of interest — and concluded that these northern lands were non-irrigable because Kersich's costs were a few dollars higher than Kleinman's severely limited, error-written payment capacity study of citrus. (TR III, 542, 562). No one on behalf of the trustee so much as suggested that Kleinman review his studies or consider grapes or dates, both of which he knew to be profitable. (TR V, 823, 836-838; XXX, 6143-6146).

Against this backdrop it is not difficult to conclude that the United States has been considerably less than consistent in its attempt to wear more than one hat, and that its ultimate conclusions conflicting with those of the Quechan Indians must be carefully considered since they are the logical result of the past and existing conflict of interest. In other words, fear of the impact of the total admission of inadequate representation by the United State due to its conflict of interest allows us to understand why it has only made a partial admission in these most recent Indian hearings. Yet, this partial admission should strongly suggest a great degree of caution in evaluating the State parties' negative arguments regarding the Quechan Reservation. This we submit is what guided Special Master Tuttle.

C. The Indians Initiated These Hearings.

For some strange reason, the United States has attempted to have everyone believe that the State parties were responsible for the most recent hearings. On the other hand,

the State parties *et al*, at Page 95 of their Exceptions have stated that "the United States initiated the current proceedings in late 1978". The truth of the matter is that it was the Indians who "triggered" the current proceedings when in 1971 the leaders of their five Tribes were asked by the United States and the State parties to stipulate as to the amount of water they could have from the Colorado River. This was to be done without the benefit of either independent counsel or a hearing. In the wake of many meetings that followed, the Indians refused. Their story is now verified by portions of the Affidavit of Lewellyn Barrackman, Chairman of the Fourth Mojave Tribal Council, who said:

> "In response, the Indian leaders objected to the Stipulation and requested that a diligent effort be made without further delay to obtain the facts so that the truth could be presented to the Supreme Court.
>
> "In early 1971, the Indians requested that the Secretary of the Interior make funds available to employ experts in the area of soil classification so that their irrigable acres under the *Winters* Doctrine could be correctly determined. Again the Indians were urged to accept the proposed Stipulation — the 'deal' that their trustee had made with the States and the Irrigation Districts! Our Indian leaders in turn went to see the Chairmen of the Indian Subcommittees of both the Senate and the House.
>
> "On March 31, 1975, a consulting firm was employed. The consulting firm soon found that the priority dates claimed and acreages claimed were wrong, and were based upon 'a deal' made by the States and not upon facts.
>
> "Again, in 1975, the Indian leaders were again called to a meeting by the Bureau of Indian Affairs to consider the soil classification work which had been completed, and to give their approval. The preliminary results

looked rather good to our Indian leaders, but we could not give our approval due to the fact that certain specific areas of land had not been included, and we were unwilling to endorse such deception. At this time we were warned that if we kept on insisting upon the truth being presented to the Supreme Court that we would really be in trouble. Although we had no wish to be unreasonable we firmly felt that anything short of a truthful presentation would be both intolerable and unconscionable. Hence, all of the Indian leaders agreed to stand firm.

"In May of 1977, the States gave up on their plan to sell the proposed Stipulation and filed a joint motion to have the Supreme Court enter a decree which in substance was the same as the Stipulation. In response, the United States has continued its refusal to aggressively advocate our Indian rights. In fact, when I requested additional time to provide Indian input for the response I was once again told that this could not be done. Hence, since we really lacked true legal representation for our Indians, I called a meeting of our Indian leaders and we agreed to ask the Supreme Court to take cognizance of the inherent conflict of interest which besets the United States, and to allow us to have our position presented by independent legal counsel of our own choice." (Appendix A to the Indians' Petition to Intervene, dated April 7, 1978).

It should therefore be apparent that the filing of the Petition by the Indians was in fact what triggered these proceedings. The Tribes believed that they had been entitled to a full and complete presentation of the facts, and that their trustee had failed to do this. They further believed that it was the conflict of interest which had beset their trustee that had precluded the United States from asserting claims for a greater amount of water to which they were legally

entitled. The Quechans understand that in general when legal representation is provided by the United States on their behalf that they will be bound. *Heckman v. United States* (1912) 224 U.S. 413, 445-46, 32 S. Ct. at 434-35. On the other hand, they are also mindful that when the United States breaches its trust duty to the Tribes while openly advancing its own interest the Tribe would not be bound. *Winship v. Ricketts* (1929) 32 F.2d 476, 479 (8th Cir.) and *Seminole Nation v. United States* (1942) 316 U.S. 286, 62 S. Ct. 1049, 86 L. Ed. 1480. The State parties have urged that the Indians should not have been allowed private counsel because they argue that this is only proper when the United States first admits that there is a conflict of interest. The Quechans disagree because this would deny the Indians the right to counsel of their choosing in cases where their trustee was beset by a conflict of interest but was unwilling to admit it. The Quechans therefore believe that the Special Master should be sustained by this Court for having allowed their intervention. *Trbovich v. United Mine Workers* (1972) 404 U.S. 528, 30 L. Ed. 2d 686, 92 S. Ct. 630.

II.

THE SPECIAL MASTER'S CLASSIFICATION OF THE PRACTICABLY IRRIGABLE LANDS NORTH OF THE ALL AMERICAN CANAL IS SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

Special Master Tuttle on Page 253 of his Report sets forth his findings regarding the practicably irrigable lands claimed by the Quechan Indians that are located north of the All American Canal. He said:

> "In short, I find that 6,785 gross acres north of the All American Canal are arable. Considering the suitability and economic analysis above, these acres are thus, practicably irrigable."

The Special Master then on Page 254 states his conclusions regarding the practicable irrigability of the Quechan indian lands by saying:

> "The gross irrigable acreage consisting entirely of boundary land in California both north and south of the Canal must be converted to net figures. As performed by the Tribe's experts this calculation would be:

California Boundary Lands	Gross Acres	Net Acres
Northern Lands	6785 × .90	= 6107
Southern Lands	98 × .94	= 92
		6199

> The net acres are thus entitled to diversion rights as follows:

Net Acres	Diversion Rate (A.F.)	Total (A.F.)
6199	× 6.67 (A.F./Ac.) =	41,347 (A.F.)

> The decree should be amended accordingly."

The State parties, *et al.* challenge the Special Master's conclusion by arguing that it is not supported by the evidence. In reply the Quechans would like to say that the State parties' discussion in their briefs and their Exceptions regarding these lands north of the All American Canal is marked by omissions, inconsistencies, and contradictions. By way of evidence we wish to cite specific examples as follows:

1. One of the most interesting observations regarding the State parties' argument was their non-discussion of prices. It is the second part of their payment capacity analysis for permanent crops. The first part is an analysis of

yields, which discusses specifically and in detail the comparative yields of the Indian experts (*e.g.*, witness Boyle's projected yield of 5.5 tons per acre for grapes) and their Bookman-Edmunston (hereinafter BE) experts (*e.g.*, 4.4 tons per acre for grapes).

By contrast with these specific yield analyses, the State parties' discussion of prices performs the tour de force of never once mentioning anybody's price for any crop. In the abbreviated (four page) discussion the State parties talk about the concepts of 1980 price data, 1979 costs, "representative prices and costs," five-year averages, three-year averages, gross revenues, all in the most general, uninforming language, in remarkable contrast to the specific discussion of various experts' yield projections.

The reason is easy to see. There was no way for the State parties to discuss actual prices without disclosing the way they had reached their low payment capacities. The best example is grapes. (Ex. SP 121). The State parties trumpeted throughout the hearings the inability of grapes, at a $58 payment capacity, to pay water costs which in every case greatly exceeded that amount. The BE payment capacity numbers were inexplicable; there was simply no way to square them with the testimony of all the witnesses that grapes were showing a profit of around $1000 per acre after *all* costs. (As one example, Henry Chavez, the State parties' witness, testified that the five-year average profit for Coachella grapes was over $1000 per acre.) (TR XXIV, 4825). The question was how BE did it.

BE did it by repudiating its announced method of determining prices. One of their most significant witnesses was Mr. Beeby. Beeby's testimony on this point deserves emphasis. He said that BE started with an average of the last five years' prices. But if prices are seen to rise continually over the five years, "you would be understanding to use

the five year average, and would probably be justified in, say, taking the last two or three. (TR XXI, 4083).

If the foregoing method of determining prices had been applied to grapes, it would necessarily have resulted in BE's taking an average of the last three years' prices, 1977-1978-1979. We say necessarily because the evidence was that grape prices were depressed in the early years of the 1970's as a result of the farm workers' grape boycott as Nicholas Kondora of the White Wing Ranch testified:

> ". . . the grape industry went through quite a traumatic experience through the Caesar Chavez days in the late '60s and early '70s." (TR X, 1855).

White Wing, he said, lost money in the Caesar Chavez years.

> "I imagine we have lost as high as $800, $900 an acre, and made as much as $2000 an acre." (TR X, 1856).
>
> "Q. Those $800 to $900 losses you talked about . . ., were those the Caesar Chavez years?
>
> "A. Yes." (TR X, 1886).

It is immediately apparent that any estimate of prices which would take into consideration the grape boycott years of the early 1970's would not only be unfair but would violate BE's own criteria. *Yet this is exactly what BE did.* BE's investigations showed that grape prices for the three-year period 1977-1979 averaged $943 per ton. (Ex. FY-43). This number was some $265 per ton higher than the grape price used by Boyle in its initial analysis of the profitability of grapes. (Ex. Fm-2, the Boyle report on Fort Mojave, shows a price of $680 per ton). BE looked closely into this discrepancy and discovered that Boyle had come to its number on grape prices by averaging not the last three years or five years or any number of last years but instead by using prices for the years 1971-1978. The BE investigators re-

ported specifically on this point, "Looks like Boyle used 1971-1978 prices." (Ex. FY-44).

Knowing that Boyle had used a time frame which BE by its own testimony considered improper and knowing that the average of the last three years, the right time frame to use, would produce an additional $265 per acre in estimated grape prices, BE had no doubt about what to do; BE repudiated its own standards and adopted the Boyle 1971-1978 prices for grapes. The result, of course, was to drive the gross grape price down by over $1000 per acre (the BE yield estimate of 4.4 tons × $265 per ton = $1166.) And this is how the state parties have been able to reiterate their theme that grapes do not have a high enough payment capacity.

The truth is that, as a BE consultant, Camal Sakouri, told BE, grapes are "extremely profitable . . . tremendous money." (Ex. CR-16, p. 2). Chavez said Coachella grapes netted $1500-$2000 per acre in 1980 and only slightly less than that in 1979. (TR XXIV, 4825). To illustrate just how profitable grapes have been we offer some additional calculations using, once again, the State parties' format in Exhibit SP-121. The first calculation is based on the testimony of the State parties' witness, Michael Bozick. The State parties rely heavily upon Bozick, who we submit came to bury the Indians. Bozick's most extreme statement was that the maximum grape production that could be gotten from the northern lands would be about 300 lugs (3.3 tons) per acre; in other words that the class IV northern lands would produce 50 lugs per acre less than his class VI very rocky, very gravelly soil. We believe that his testimony is an exaggeration and that the best explanation for it is that Bozick is a Coachella Valley grape farmer who does not want California water to go to the Indians and does not want competition from the Yuma area. The strongest evidence

in support of our belief came in the State parties' opening brief, in their statement that the inhabitants of the Coachella District look on this water litigation "not just immediately as a matter of economics, but potentially as a matter of survival." (SP II, 40). A witness who fears for his survival cannot be expected to be objective in his testimony.

But if Bozick's testimony were taken straight, it would still show grapes to be profitable on the northern lands. If the State parties are to rely on part of Bozick's testimony, then it is only fair that they take it all, prices as well as yields. One need only compare the BE grape price of $680 per ton used in Exhibit SP-121, with Bozick's grape price of $1091-$1339 per ton (Bozick said he got $14.70 per lug but others would get $2-$3 less, so we use $12-$14 per lug; TR XXVII, 5530) to appreciate why the State parties have avoided discussing any specific grape prices. And if we accept Bozick's 300 lugs (3.3 tons) per acre and the low end of his prices, $1091 per ton (what he said others would get; TR XXVII, 5530), a calculation in the format of Exhibit SP-121 shows that, adjusting harvest costs for the reduced yield, grapes show a profit in the fifth year, all borrowings and interest are repaid by the ninth year, and the accumulated net profit at the end of 25 years is $17,530. This calculation is set forth in detail in Appendix A, page i, at the end of this Response.

Of course, Bozick said he was incurring more fertilizer and other pre-harvest costs on his class VI lands. He did not estimate those costs, but if we accept even BE's high estimate of a 25 per cent increase in production costs, grapes are still profitable on Bozick's numbers. Under these harshest of all assumptions, grapes show a profit in the fifth year, repay all borrowings and interest in the fifteenth year, and produce an accumulated net profit at the end of

25 years of $8,329. This calculation is set forth in full at page ii of Appendix A to this Response.

These calculations dramatically expose, also, the exaggeration in Bozick's testimony. He said that at 350 lugs per acre and $14.70 per lug he was just breaking even. Lowell True, another witness, told the BE people that 350 lugs per acre was sufficient to show a profit "throughout the state" (Ex. FY-43), and the above calculation at 300 lugs per acre shows how right True was. At 350 lugs, using $1339 per ton ($14.70 per lug) and an assumed 25 percent increase in pre-harvest costs, Bozick would be grossing over $5000 per acre, he would be showing a net profit in the second grape-bearing year, and would have an accumulated net profit at 25 years of over $36,000. There is simply no way to reconcile Bozick's own numbers with his claim that he is merely breaking even on his class VI very rocky, very gravelly soil.

We make one final calculation of grape prices, which arose out of the opening brief of the other tribes. The tribes there say that witness Maddock in his later testimony used a five-year average and derived a price of $869 per ton. Our grape analysis was predicated upon a price of $930 per ton, which was the lowest price of the three years 1977-1979. We used a three-year average because the criteria established by BE dictated the average of the last three years in this case. But if we instead use Boyle's estimate at $869 per ton, with harvest costs adjusted to reflect a reduced yield from 4.4 to 3.85 tons (the same procedure that was followed by BE in its exhibit SP-121), the profitability of grapes at $869 per ton is clear. All borrowings and interest are repaid at the end of 16 years, and there is an accumulated net profit at the end of 25 years of $6,616. The calculations are shown in full at page iii of our Appendix A.

In sum, grapes are "extremely profitable" by everyone's numbers and would be on the northern lands.

2. In contrast to prices, the state parties argue at length about the difference in the Boyle projected yield of 5.5 tons per acre of table grapes and the BE projection of 4.4 tons. As we believe is obvious, we have a twofold position on the matter of yields. In the first place, we believe that the Boyle projection is reasonable. Secondly, however, we think that it is unnecessary to decide the point because even at a yield substantially lower than the 4.4 tons projected by BE, grapes are profitable. On this point the state parties assert that "there has been some indication that you can make a profit on grapes at only a 350 lug yield." (SP I, 201; the state parties cite the transcript at 5666-5667, which is more likely FY-43). There is much more than just "some" evidence. Exhibit FY-43 is Lowell True's statement to the BE investigators that 350 lugs (3.85 tons) has been enough to be profitable throughout the state. There is *no* evidence to the contrary. Bozick admitted at pages 5567-5568 that he covers *all* expenses on his 350-lug yield on class VI land (and as we have just seen, he does a lot better than that.)

Lowell True also believes that state parties' assertion that BE's agricultural contracts were either negative or neutral as to permanent crops along the Colorado River. True was one of the principal agricultural experts BE consulted, and it was True's opinion, of which BE was aware, that

> "based on the limited climatic data available, the winter chilling hours and accumulated heat units should be adequate to produce the same variety of table grapes, deciduous fruit and pecans that are currently being grown in this area [Phoenix]. All of these crops respond well to deep, well-drained soils and good quality ir-

rigation water, the Colorado River source being a big advantage in this respect." (TR XXI, 4185).

3. The state parties contend that it would not be economically feasible to grow grapes because marketing 9,700 additional acres of grapes would affect the market price. This argument is the last refuge of a competitor. Obviously, the laws of supply and demand affect markets. There have been recurring times in Southern California, for example, when too many oranges have been planted. But this has nothing to do with deciding whether soils are practicably irrigable. Markets will fluctuate. Prices will rise and fall. Growers will go into and out of production of particular crops. But if the effect of production on prices were to be a determining factor in whether to go into production, it is almost a certainty that the majority of all decisions by all growers to produce particular crops would be deemed economically infeasible because of the effect on the market. Indeed, to us the very fact that this contention is made is the best possible argument against using economic feasibility as the criterion for determining practicable irrigability. But whether or not the Court accepts the position of the Quechans on that point, the question of the effect of production on markets is not a proper criterion for determining practicable irrigability.

Even if the effect on markets were a proper consideration, the short answer to the overproduction argument is that no one suggests bringing in 9,700 acres of table grapes in one year. The technical problems involved in planting that many grapes would alone preclude such action. Chavez testified that because the demand for table grapes is strong and increasing (TR XXIII, 4700-4701, 4758-4759) Superior Farms is planting 300 new acres per year, and in addition is removing approximately 1,000 acres of citrus in the Bakersfield area and replacing it with white wine grapes. (TR

XXIII, 4759). If the Indians were to follow a similar program — say, 500 new acres per year over 10 years — the depressant effect forecast by the state parties would be avoided, and some such program of gradual development is what would have to occur considering the magnitude of the task.

4. The state parties contend that there is no commercial history of table grapes in the lower Colorado River valley. They mention the 160 acres of grapes on the Yuma mesa that were supposedly taken out because they couldn't meet minimal packing and marketing demands. The State parties omit Dr. Kleinman's comment on that same 160 acres of grapes that the farmer (Bud Linfesty) said that his grapes did rather well. (TR V, 820). They omit the findings of BE investigators about those 160 acres that "they performed very well *and matured early*." (Ex. FY-47; emphasis added). They omit the testimony of Richard Kaighn of Von Santau Ranch, for whom Linfesty now works, that "Mr. Linfesty is an old-time grape farmer, and he planted, that I know of, 160 acres of grapes on the Yuma mesa.

"Q. How did they do?

"A. They did very well; they did very well. Grapes are obviously a good crop for that area."
(TR IX, 1633).

They omit Lowell True's explanation for why Yuma area grapes went out of production in the early seventies, namely that "grape prices were low and citrus high therefore due to economic pressure." (Ex. FY-42). They omit the findings of the BE investigators that in 1969 there were 1,070 acres of table grapes being grown in Yuma County, *and in 1978, 1,110*. (Ex. CR-25). And, of course, they redefine the Colorado River Valley to exclude the White Wing Ranch, even though Kondora testified that it is all the same Southern California-Southern Arizona desert area and he was not

aware of any significant climatological differences between the White Wing area and the Yuma area, White Wing he thought, being just slightly warmer in the winter time than Yuma. (TR X, 1883-1884).

In short, the state parties omit all evidence showing that grapes are a good crop for the Yuma area, have done well there, and have matured early. As we have pointed out below, there are actually more heat units in the Yuma area than Coachella during the growing season, so that Yuma grapes, as Linfesty's acreage suggests, would probably mature earlier than Coachella.

5. The parties contend that the lack of permanent crops in the Colorado River Valley proves that they are not suitable for production there. They quote Chavez' testimony that the lack of such crops in the area suggests environmental and climatic factors precluding production. (SP I, 104). This argument is specious but is defeated by past experience. If his point were to be taken seriously, one would have had to conclude in 1960 that the San Joaquin Valley was not suitable for growing pistachios because none were being grown there. All it took to prove the theory wrong was one farmer named Ruley who started to make a lot of money on three and one-half acres of pistachios. As a result, there are thousands of acres of pistachios in production in the San Joaquin Valley today.

The same experience defeats the argument as to grapes. The White Wing Ranch, as the state parties admit, is growing grapes profitably. (SP, Vol. I, p. 162). The first grapes were planted at White Wing in 1959, and according to the state parties there was no record of any successful commercial production of grapes anywhere in the area at that time. If that were the criterion, grapes would not have been planted at White Wing in 1959, because the lack of production would supposedly have demonstrated that grapes

were not suitable for the area. Yet White Wing has an over 20-year record of grape production at this point, and is making a handsome profit. The lack of large-scale grape production in the Yuma area means only that nobody has yet analyzed the success of Linfesty's 160 acres and the White Wing's 700 acres closely enough to make additional large-scale plantings.

6. The state parties contend that a vice in the tribes' economic feasibility studies is the assumption that there will be a high level of management; "that all the Indian farmers will be the best farmers . . . ." (SP I, 108). The short answer is that the Indians themselves need not be the best farmers, they need only be able to hire the best management, which would be economically feasible for the scale of operations projected here, and the State parties do not, and we presume would not, attempt to argue that the best management could not be retained.

7. The state parties contend that the great problem with grapes along the Colorado River is that the winters are cooler than Coachella, which would mean later harvest, loss of competitive advantage, and the dangers of summer rains and heat. (SP I, 163-170). Witnesses Beeby, Chavez, and Bozick all made this argument based on their knowledge that it gets hotter in the winter in Indio (Coachella Valley) than it does in Yuma. But the mistake all of them made was to assume that a higher maximum winter temperature equates with higher heat units during the winter growing season. It is clear that it is heat units, not maximum temperatures, that are important (TR XXIII, 4785-4788), and the number of heat units in Yuma during the critical winter growing season substantially exceed Indio's. Thus, the very argument on which the State parties rely to suggest a later harvest in Yuma actually proves that there would be an earlier harvest in Yuma than in the Coachella Valley, and

the supposed problems with summer heat and rains disappear. As Kondora of White Wing, which is competitive with Coachella, stated, one of their advantages is that they don't get excessive heat or rain at harvest time. (TR X, 1867-1868). The State parties, recognizing this problem, claim repeatedly that White Wing is warmer than Yuma, but as we pointed out above, Kondora actually said that there was no *significant* climatological difference, there being only a slight temperature difference. (TR X, 1883, 1886). So there would be no significant difference in harvest time between the two areas.

And Kondora was comparing White Wing temperatures with the Yuma mesa. Lord testified that the northern lands would have a better temperature and heat unit advantage than the weather station at the Yuma airport (which is Yuma mesa); that because of their southeasterly exposure and good air drainage, the northern lands would do better than the Yuma mesa. (TR XXXI, 6406-6407).

8. On the same point, the obvious difficulty, reflected in the State parties' argument of overcoming the facts, which show that Yuma grapes would harvest earlier than Coachella, has forced the State parties into an argument manufactured from whole cloth. They contend that the formula chosen by Richard Smith of Boyle for computing heat units *may* be inaccurate in utilizing average monthly and average (mean) daily temperatures, both of which methods show more heat units for Yuma than for Coachella. The State parties argue that the right formula *may* be average (mean) maximum daily temperatures, which they say would favor Coachella. They admit they do not know this to be true, but they contend that there is insufficient evidence to determine *the* correct formula and, therefore, that the tribes have failed in their proof.

This argument requires an insouciant disregard of Chavez' testimony. Chavez said that what we are talking about is the number of days in which the temperature goes above a certain minimum and the number of hours during that period of time that the temperatures would exceed that minimum. (TR XXIII, 4787). Now, that computation is exactly the one made by Richard Smith. As shown on exhibit CR-35, he calculated the number of degree days (heat units) as equalling the average monthly temperature minus 50° F. and multiplied that by the number of days in the month. That computation produces the number of heat units which Chavez testified ws the correct formula.

The State parties now suggest that average (mean) maximum daily temperatures might be the correct formula without offering a shred of evidence that in fact it is a meaningful formula. Smith, by contrast, testified that the approach shown on exhibit CR-35 is the formula for determining heat units between bloom and harvest *and is a widely accepted approach in the profession*. (TR XXX, 6195). That testimony is credible; the unfounded suggestion by the state parties of a possibly different formula, with no support in the record, is not credible. The plain fact is that Yuma will have more heat units for grapes in the winter growing season than Coachella, will harvest earlier, and will have a competitive advantage.

Smith's testimony was corroborated by the soils expert for the Quechan Tribe, Mr. Joe Lord. The State parties would dismiss Lord's testimony in Atlanta because Lord testified that he did no comparative climatological studies for his original report, which is true but not pertinent. Between the time Lord testified in Denver and the time he took the stand in Atlanta, Chavez and other witnesses had testified for the State parties as to the supposed climatological advantage of Coachella over Yuma. For that reason,

counsel for the Quechan Tribe specifically asked Lord to do a climatological study of weather records at Yuma and Coachella, and Lord testified that he used the air base at Yuma and at Indio as a basis for a comparative climatological study. (TR XXXI, 6405). He calculated the growing degree days for four years back, from 1977 to 1980 inclusive. He determined that Yuma had a higher accumulative growing degree day than Indio. He examined exhibit CR-35 and determined that the study he made was of the same kind as Smith's study. He had examined exhibit CR-35 before testifying in Atlanta, and the conclusions there were consistent with the ones he independently reached. Like Smith (and like Chavez), he testified that it was the *average* daily temperature which was to be utilized for the purpose of calculating growing degree days, and he testified that in his opinion grapes on the northern lands would come in earlier and be taken off the ground earlier than Coachella. (TR XXXI, 6404-6405).

In connection with Lord's testimony, the State parties argue that the northern lands are higher than Coachella, from which it apparently is supposed to follow that temperatures would be lower. The contrary is true. As Virgil Jones testified, it generally is true in the Colorado River Valley areas that the temperature is higher as one gets higher up on the mesa. (TR XXIV, 5009-5010). On most mesas, he said, there is a drainage of air that keeps the low temperature from dropping to a very low, and conversely it gets hotter up there in the hot season during the middle of the day than it does in the valley. That is pretty much true throughout the year, he said, that the higher mesa areas are not going to get as cold at night and will get hotter during the daytime. (TR XXIV, 5035-5036).

9. The foregoing comments about heat units, demonstrating that the Yuma area would have at least as early and

probably an earlier harvest time than Coachella, disposes of the entire argument of the state parties that summer rains would be a problem in the Colorado River area. The whole argument is based on the premise that harvest time will be later in the Colorado River area than Coachella. On the basis of the evidence demonstrating the earlier harvest time in the Yuma area, the summer rain threat disappears. So does the summer heat threat, which, once again, would present no greater problem in Yuma than in Coachella, with the latter's higher maximum daily temperatures.

10. State party witness John Bailey is cited for the proposition that lands with high concentrations of boron would be totally unsuitable for fruit, and it is extremely improbable that the boron could be leached. (SP I, 86-87). Bailey so testified in Denver; the State parties later acknowledge Bailey's retreat from that position to his later conclusion that 5,820 acres were arable, subject to leaching tests in the field to prove that boron could be removed. If Bailey had continued to believe that it was extremely improbable that the boron could be removed, he would not have later labeled those lands arable.

11. The State parties say that Bailey found 5,540 acres of the northern lands to be "potentially arable", but in fact Bailey did not say anything about their arability being "potential." He reported on exhibit SP-139 that those 5,540 acres (and 280 more) were "arable, suitable only for trees and vines." Exhibit FY-49, the BE analysis, finds those same lands to be "gravelly and/or cobbly, suitable for trees and vines only." And in the Bailey testimony which the state parties cite (TR XXV, 5077), Bailey says, "the most extensive areas shown in green are considered suitable for trees and vines." As we have said, there is agreement between the Lord people and the BE people that 5,820 acres

of the northern lands are suitable for irrigated agriculture for permanent crops.

12. The State parties cite the testimony of Virgil Jones about the deep washes and rocky soil of the northern lands. They omit that portion of Jones' testimony in which he acknowledged that there were large areas of the northern lands which were flat desert pavement "very large areas" as he said. (TR XXIV, 5033). The deep washes Jones was describing were not areas found by the Quechan experts to be practicably irrigable. (TR XXIV, 4912). Jones testified that leveling and smoothing costs would preclude economic farming of the lands he was discussing (TR XXIV, 4910, 4913), whereas one of Lord's cardinal points in his testimony was that the lands he proposed to irrigate should not be leveled or tilled at all, further evidence that Jones was not describing the lands Lord found irrigable. The same comment applies to the testimony of Bozick, who apparently looked at that portion of the northern lands which involved deep gorges and ditches and in his opinion would require leveling but then went on to acknowledge that there were apparently large flat desert pavement areas in the northern lands and that the gully and wash problem did not exist on those lands. It seems apparent that Bozick did not even see those large flat areas. When he was asked about them, he did not testify that he had seen them but said "I understand that" those areas exist. (TR XXVII, 5564-5565).

13. The State parties attack Lord's findings of irrigable acreage by pointing out that Dr. Stoneman found only 3,200 acres to be irrigable, which they describe as "even less" than the arable acreage Bailey found. (SP I, 94). This is hardly an attack on Lord; rather, it shows the inadequacy of the whole United States investigation of the northern lands.

14. The State parties attack the Quechan's expert witness, Joseph Lord, not on what he said or did but on a supposed lack of qualifications. Thus, for example, the State parties contend that soil analysis, suitability for crops, and classification of crops are "fields of inquiry which are outside the limits of his expertise." It is a compliment to the solidity of Lord's testimony that the State parties have elected not to attack it directly but to attack the witness himself. The record of Lord's qualifications, however, destroys that attack. We are talking about a man who has spent 17 years in soils work. His qualifications include the following:

(a) He spent four years in southeast Asia with the Bureau of Reclamation doing irrigation and drainage studies. They were investigating a large land area for potential irrigation out of the Mekong and other rivers. (TR X, 1957-1958).

(b) He spent three years with the Bureau of Reclamation, from 1971 until 1974, in charge of the Irrigation Management Services program, a demonstration research project for improving irrigation efficiencies on federal lands. The program included educating landowners in plant water use and irrigation efficiency. (TR X, 1958-1959).

(c) He spent five years with Harza Agricultural Services, rising to the position of president of the company. The work involved contracting with private landowners, farmers in production, to assist in their water management. (TR X, 1959).

(d) The services of Harza included also soil mapping and soil classifications on two large ranching operations (one of 20,000 acres) involving complete typographical mapping with aerial photography and stereo plotting. (TR X, 1961-1962). The purpose was to assist the landowner

to develop his soil, land, and water. (TR X, 1961). In addition, Harza operated a complete agricultural laboratory for analyzing soil, water, and plant tissue; complete, meaning that it performs all of the agricultural analyses necessary for management of soils or crop fertility, including salinity, pH, AWC, and similar tests. (TR X, 1960-1963).

(e) Lord personally wrote a computer program for Harza, based on his Bureau of Reclamation work, which assists landowners in evaluating soil, water, plants, and atmosphere, and helps in predicting changes in irrigation, all for the purpose of assisting the landowner in the irrigation of his lands. (TR X, 1964-1965).

(f) Lord acquired the business of Harza in 1978 and since then has headed his own business furnishing agricultural services to agribusinesses. In the Yuma area they provide a complete range of services to a 15,000-acre farm, operated by Red Mountain Farming Co., which also plans to bring in another 15,000 acres in the next two years. Lord's company provides laboratory, engineering, agronomics, and cropping plans for Red Mountain. (TR X, 1965).

(g) Red Mountain Farming Co. is only one of Lord's clients. His daily business at the present time involves management and irrigation services to clients farming 60,000 acres of land. (TR X, 1965; TR XXXI, 6398).

(h) The personnel of the Lord Company, who participated in the soil suitability classification study of the northern lands included, besides Lord, two degreed agronomists, a soils or field technician, and an agricultural scientist with a degree in biology, who has worked in agriculture for a number of years. And in addition, he utilized as an outside consultant Dr. Donald Post, who is affiliated with the University of Arizona, has a wide background in inventory

and evaluation of soil characteristics and mapping of soils, and has an intimate knowledge of the complex of soils that the Lord group were dealing with in the Yuma area. Post worked in the field with the Lord group. (TR X, 1967-1969).

15. The State parties' attack Keith Satermo's testimony, the engineering expert produced by the Quechans. They argue that his water delivery system is inadequate on the ground that it is not rebuttal testimony. (SP II, 45).

Apparently the state parties' impression is that Satermo's own calculations of the cost of a water delivery system, as reflected in exhibits FY-18 and FY-57, were not offered as evidence but were used merely as a foundation for further calculations suggested by Quechan counsel. Nothing could be further from the truth. Satermo's opinions as to the cost of a water delivery system are reflected in FY-18 and FY-57, both of which are in evidence. Thus, it is incorrect to attempt to limit Satermo's rebuttal testimony in Atlanta to exhibit FY-58, as the state parties do. (SP II, 46). As one example, Satermo's calculations as to costs are shown on FY-57. The fact is, however, that Satermo used a May 1980 date for calculating costs. Everyone else had used July 1979. FY-58 reflects costs as of July 1979. Had it been critical to the Quechan case, we would have emphasized much earlier our right to make the adjustments to Satermo's opinions which are shown in the changes from FY-57 to FY-58. As it happens, our economic analysis [illegible]s that the permanent crops we discuss are feasible even at Satermo's higher cost figures, so the reductions shown in FY-58 (and the reductions from FY-18 to which Satermo testified in Denver) would become important only if the Special Master had concluded that the payment capacity for water costs were too high.

16. The State parties contend that the Quechan Tribe has presented no economic analysis to support any claim of practicable irrigability for citrus, dates, and asparagus. The evidence in the record on those crops shows them all to be economically feasible. The State parties contend that "dates made their first real appearance in this matter during the Fort Yuma rebuttal case." (SP I, 180). On the contrary, the Quechans began their presentation of evidence on dates with extensive cross-examination of Dr. Kleinman in Denver on the subject and continued in Denver by obtaining evidence from Kondora as to the profitability of dates. Further evidence was obtained on cross-examination of Dr. Chavez, which demonstrated the high profitability of dates, and from subsequent testimony in Atlanta by witness Bell. The State parties claim that "there was, of course, no economic analysis" (SP I, 181) meaning apparently that the Quechans did not put a Dr. Kleinman on the stand. There is no magic formula for economic testimony. Any evidence in the record demonstrating the economic feasibility of dates is admissible and entitled to be weighed by the court. The Quechans are satisfied that the very strong evidence on the profitability of dates, coming from witnesses for the United States, for the state parties, and for the Quechans themselves is sufficient to make the economic analysis for that crop.

The Quechans also put on evidence on citrus from a successful grower, which we submit is superior testimony to that of economists presenting secondhand opinions. The State parties would throw out that evidence on the ground that the Quechans should be bound by the testimony of their own expert, Lloyd Zola, that he discarded citrus. Zola, of course, did no independent studies. He simply analyzed what Kleinman, Boyle, and BE had done.

We have made our case on the direct evidence in the record; in the case of citrus, the experience of the Von

Santau Ranch and our critical analysis of the Kleinman and BE citrus studies.

17. The State parties contend that there should be a reduction from gross to net acreage of 6 percent. The Quechans contend that that reduction does not apply to the northern lands because, as indicated in the Lord report, a 10 percent reduction has already been made by Lord to provide for drainage, and the necessary canals, roads, and structures could be provided within that reduction.

III.

THE BOUNDARIES OF THE RESPECTIVE INDIAN RESERVATIONS HAVE BEEN "FINALLY DETERMINED".

On August 28, 1979, Special Master Tuttle in his Memorandum and Report on Preliminary issues said:

> "I conclude that the determinations that have been made with respect to the stated boundary changes may be accepted as final for the purpose of considering additional allocations of water rights to the reservations."

In response, the State parties have taken exception to this conclusion by asserting that the Orders of the Secretary of the Interior and the judgments of the Federal Court cases he relied upon were not final determinations of reservation boundaries for the purpose of establishing water rights. Then they have added that the United States and the Tribes must first establish through adjudication with the contesting parties in other litigation the correctness of any disputed boundaries. The Tribes submit that the law is contrary to the State parties' position, and that Special Master Tuttle is correct.

It is important to note that the State parties admit that adjustments for boundary determinations were explicitly provided for in the 1979 Decree and impliedly contemplated

in the 1964 Decree. "In the event that the boundaries of the respective Reservations are finally determined." Thus, their argument against the Master's recommendations turns on the question of whether or not the boundaries have been "finally determined". In other words, the issue raised by their exception is whether Secretarial Orders, Court judgments, and Acts of Congress relied upon by the Tribes of the United States are final determinations within the contemplation of this Court's Decrees.

The Tribes submit that it is strange that the State parties have raised this issue for the first time. During the first hearing in this case no State party contested the right of the Court to accept as final and binding for the purpose of this litigation the then-recognized boundaries of the Indian Reservations involved. The boundaries at that time were the result of Secretarial Orders, Court judgments, and Acts of Congress. Nevertheless, they were all deemed to be final for the purpose of water allotments then presented to the Court. This undoubtedly happened due to the fact that it was totally consistent with the existing law and authority. For instance, one need only look to 25 U.S.C. 176 to discover the authority which established the Secretary's right to define the boundaries of Indian Reservations. Therein the Congress expressly declared that surveys of Indian Reservations shall be under the "jurisdiction and control of the Bureau of Land Management and as nearly as may be in conformity to the Rules and Regulations under which other public lands are surveyed." 43 U.S.C. 751, 752 establish the general rule for the conduct of such surveys. 43 U.S.C. 772 authorized the resurvey of boundaries:

> "The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made as he may deem wise under the Rectangular System in that date provided by law such resurveys or retracements of the

> public lands as, after full investigation, he may deem essential to properly mark the boundaries of public lands remaining undisposed of: provided that no such resurvey or retracement shall be so executed as to 'm-pair bona fide rights or claims of any claimant, entry-man, or owner of lands affected by such resurvey or retracement."

Our Courts have viewed this statute as a broad grant of authority stating that, "prior to title passing from the United States, it is undisputed that the government has the power to survey and resurvey, establish and reestablish the boundaries on its own land." *U.S. v. Reimann*, 504 F.2d 135, 138 (10th Circ. 1974); See also *United States v. State Investment Company*, 264 U.S. 206 (1924). In other words, no one can seriously doubt the authority of the Department of Interior with respect to public lands. *United States v. Schurz*, 102 U.S. 378, 395 (1880); *Cragin v. Powell*, 128 U.S. 691, 697-699 (1888); *Knight v. United States Land Association*, 142 U.S. 161, 177-178 (1891); *Johanson v. Washington*, 190 U.S. 179, 185 (1903); *Lane v. Darlington*, 249 U.S. 331, 333 (1919).

A. The Allegation of Unilateral Action.

Notwithstanding the well established law pertaining to the legal rights of the Secretary of Interior to issue Orders pertaining to the boundaries of Indian Reservations, the State parties have claimed that the Secretarial Order of December 20, 1978 was unilateral and therefore improper. In fact, on Page 62 of the exceptions by the State parties, they have stated:

> "The unilateral action taken by the Secretary of Interior is almost shocking in the case of December 20, 1978 Secretarial Order relating to the Fort Yuma Reservation".

The Tribes are not shocked by the December 20, 1978 Secretarial Order, nor can they understand why the State parties should be shocked. The Order in question merely reaffirmed the boundaries of the Fort Yuma Reservation that was created by Executive Order in 1884. I *Kappler* Indian Affairs, Laws and Treaties, Page 832. Following said Executive Order of 1884, there never has been any objection to the boundary designated therein by the State parties. This undoubtedly is due in part to the fact that the State parties have never had any standing to object. In fact, the 1884 boundary really never changed. There was some confusion, however, due to an 1893 Agreement providing for cession of a considerable amount of the Reservation by the Quechan Indians. This Agreement was ratified by Congress in 1894, but as a practical matter the Agreement was not given much consideration because conditions subsequent contained therein were never fulfilled. However, a question arose after Congressional authorization for construction of the All American Canal as to whether or not the consent of the Indians should have been secured before proceeding with the construction of the Canal. Thus, in the face of an embarrassing situation Solicitor Margold for the Department of Interior wrote an Opinion that espoused the conclusion that the consent of the Indians was unnecessary since they had lost any claim to the lands traversed by the All American Canal by virtue of their 1894 Agreement.

Margold's Opinion was immediately brought under attack by the Quechan Indians, who at the time were not able to exercise a great deal of political clout. As a consequence, they proceeded to file a claim against the United States with the Indian Claims Commission for compensation by reason of this unconscionable taking of their land. By 1870, they still had not received satisfaction; so they instructed their attorney to proceed on their behalf to secure an administra-

tive resolution of their problem by obtaining a reaffirmation Order from the Secretary of the Interior. In 1975 they optimistically concluded that they had succeeded when Secretary of the Interior, Thomas Kleppe, explained in detail his desire to reaffirm the title to their 1884 Reservation. Again political clout became a factor when the State parties strongly protested any such reaffirmation Order. This was disappointing to the Indians but they persisted. Hence, with a combination of dedication and tenacity, the Indians filed a Petition for hearing in this Honorable Court in December of 1977. In early 1978 they were granted the right to file a Petition for intervention by the Court, and this led to oral argument on October 20, 1978. On that date, a representative for the Solicitor General, Mr. Louis Claiborne, orally informed the Court that after years of discussion and negotiation involving all parties, that the office of the Secretary of Interior had decided to issue a reaffirmation Order of the 1884 Fort Yuma Reservation subject to certain intervening third party rights and a new survey. Certainly the State parties cannot now be heard to complain about reaffirmation of an Order made nearly one hundred years ago by the President of the United States. Furthermore, it is inconceivable that the State parties could describe the action of the Secretary as "unilateral" in view of the repeated courtesies he extended them throughout the entire time while the Tribe was endeavoring to recover what they sincerely believed was rightfully their's. On this point it is perhaps also significant to note that the Reservation area in question was part of the aboriginal homeland of the Quechan Indians, a matter which was adjudicated by the Indian Claims Commission with a decision to the effect that the Quechans had exclusively used and occupied this area "from time immemorial".

B. State Parties Not Privy to Action.

The State parties in taking exception to Special Master Tuttle's conclusion regarding the finality of the boundaries on the respective Indian Reservations have also argued that they were not privy to what was done, and that their rightful interests should not have been ignored. Again, it is difficult to follow their argument if one merely reflects upon the facts surrounding the Fort Mojave Hay and Wood addition to the Reservation. The Fort Mojave Military Hay and Wood Reserve was created by an Executive Order on March 30, 1870. General Order No. 19 of the War Department, dated August 4, 1870, defined its boundaries. An Executive Order dated September 19, 1880, transferred the Fort Mojave Military Reservation and the Hay and Wood Reserve to the Department of Interior for use by the Fort Mojave Indians. On March 5, 1910, the State of California filed an application under the Swamp Land Act of 1850 with the Commissioner of the General Land Office of the United States for this same area known as the Mojave Hay and Wood Reserve. At that time, the records of both the archives of the United States and the Bureau of Land Management showed that the record owner thereof was the Fort Mojave Indian Tribe pursuant to that certain Executive Order of March 30, 1870. On July 9, 1912, California's claim was rejected "subject to the usual right of appeal". Ordinarily, this would have been considered a closed chapter after the period for appeal had expired, but with the passage of nearly half a century, on April 24, 1959, California decided to resurrect its claim to this land and filed a new application for the same land they had sought in 1913. Hence a new hearing was scheduled for April 22, 1965, where California's claim was for a second time rejected. This time, however, California pursued the matter with greater diligence and appealed to the Director of Land Management. Thus,

on January 24, 1966, a document entitled "Decision . . . Hearing Ordered" was issued which stated:

> "A hearing is hereby directed to be scheduled by the Chief Hearing Examiner, Sacramento, California."

Daniel Webster once said: "The truth will out", and quite fortuitously the whole truth of these proceedings initiated by California and the hearings leading to the decision to grant California a hearing came out for the first time as "startling news" to the Fort Mojave Indian Tribe during the last days of June, 1967. Neither the Tribe nor the Indian Bureau had ever received any notice of these hearings. Hence, on July 11, 1967, Commissioner Bennett of the Bureau of Indian Affairs officially requested permission for the Tribe to intervene. Intervention was then allowed and hearings were thereafter held in California, which, after appeal, led to an ultimate decision in favor of ownership of the Hay and Wood Reservate by the Fort Mojave Tribe.

In light of the above facts, how can the State of California sincerely contend that it was not privy to the facts regarding the boundary situation pertaining to the Fort Mojave Hay and Wood Reserve? After all, California was the main adversary of the Fort Mojave Tribe in this proceeding. Furthermore, their current complaint is not entitled to much consideration since they didn't even see fit to take an appeal from the determination by the Secretary of Interior's Order of June 3, 1974, acknowledging ownership of the Hay and Wood Reserve by the Fort Mojave Tribe. In the Matter of Land Classification, State of California, Applicant, Fort Mojave Indian Tribe, Intervenor. LA 0164001 Swampland Selection A-31022 before U.S. Department of Interior, Bureau of Land Management.

C. Need for Court Adjudication.

In their attack upon Secretarial Orders establishing Indian reservations the State parties have further argued that such a matter must first be determined by a court of competent jurisdiction in order to be final. However, despite the fact that there are other ways of determining the boundaries, it is submitted that the State parties are not even satisfied when the boundary question is decided by a court of competent jurisdiction because the record shows that they are still unwilling to accept the Decree. This is graphically illustrated by the case of *Mojave v. LaFollette, Fort Mojave Tribe v. LaFollette* (D. Ariz. Civ. 69-324 MR). In the *LaFollette* case an action was brought by the Fort Mojave Tribe to quiet title to certain lands they alleged were part of the Mojave reservation. There were many defendants who in turn orchestrated their defense against the Mojave allegations with a concerted motion to dismiss. Their motion to dismiss was predicated upon the claim that the Tribe did not have standing to sue. The Court granted their motion and the case was appealed to the Ninth Circuit, where it was then reversed. The reversal was predicated upon the conclusion that the Fort Mojave Tribe had recognized title, and particular reliance was placed upon the language in the 1964 Decree in *Arizona v. California*, 373 U.S. 546, 10 Lawyers Ed. 2d 542. The State of Arizona argued that the Mojave Indians were not entitled to claim any water since they really had no proprietary interest in the Executive Order Reservation upon which they resided. In response this Court said:

> "Some of the reservations of Indian lands here involved were made almost a hundred years ago, and all of them were made over 45 years ago . . . Congress and the Executive have ever since recognized these as Indian reservations. Numerous appropriations, includ-

> ing appropriations for irrigation projects, have been made by Congress. They have been uniformly and universally treated as reservations by map makers, surveyors, and the public. We can give but short shrift at this date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive."

Why should the State parties who participated in the early hearing in this case give less recognition re the Fort Mojave Reservation boundary than has been given by the United States Supreme Court? Of course, the State parties will say that they were not parties to the LaFollette lawsuit, and this sounds pretty good until one realizes that there would be no possibility for them to be parties since they have absolutely no proprietary interest in the land in question. In other words, the State parties would not have standing to sue. From this it must therefore be obvious that insisting that boundary disputes should be determined by actual adjudication in the Courts is an impractical suggestion. The laws of Congress already provide the ways and means for determining the boundaries of Indian reservations. The Tribes believe this historical precedent has been sufficient and is still sufficient. As Special Master Tuttle stated:

> "The United States, in the exercise of its plenary power to regulate Indian affairs, may establish Indian reservations by Executive Order. *Arizona v. California*, 373 US 546; 598 (1963). In the administration of public lands, the United States may survey, resurvey and adjust its surveys. *Borax Consolidated Ltd. v. Los Angeles*, 296 U.S. 10, 16-17 (1935); *Cragin v. Powell*, 128 U.S. 691, 698-700 (1888). Where such adjustment and resurveys affect private rights, they may be challenged and corrected by Court action to quiet title. *United States v. State Investment Company*, 264 U.S.

206, 212 (1924). These are precisely the sorts of determinations and proceedings which have occurred in this case."

Conclusion.

The Quechan Indian Tribe argues that this Court should sustain the Special Master who has accomplished justice as a matter of equity in the face of a conflict of interest, and who has further objectively quantified under the established guidelines of due process the legal entitlement of the Quechans to their share of water from the Colorado River, the lifestream for the lands they have occupied since time immemorial.

Dated: June 23, 1982.

Respectfully submitted,

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CLERK

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In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON EXCEPTIONS TO THE SPECIAL MASTER'S REPORT

REPLY BRIEF FOR THE UNITED STATES

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APPENDIX A.

Grape Calculations Using Bozick's 300 Lug Yield and Bozick's Prices

YEAR	1	2	3	4	5	6	7	8	9	10	25[b]
Yield - tons per acre	—	—	1.8	2.4	3.3	3.3	3.3	3.3	3.3	3.3	
Gross Income - 1091/ton	—	—	1964	2618	3600	3600	3600	3600	3600	3600	
Pre-Harvest Cost	1300	1086	951	1077	1077	1077	1077	1077	1077	1077	
Depreciation	113	113	113	113	113	113	113	113	113	113	
Interest on Investment - 10%											
Irrigation System	57	57	57	57	57	57	57	57	57	57	
Building, Equip., Tractor	28	28	28	28	28	28	28	28	28	28	
Interest on Accumulated Net Cost	—	183	363	400	404	344	269	187	97	—	
Harvest Cost [a]	—	—	491	653	900	900	900	900	900	900	
Payment Capacity (Water Delivery Cost)	331	331	331	331	331	331	331	331	331	331	
Total Annual Cost	1829	1798	2334	2659	2910	2850	2775	2693	2603	2506	
Net Annual Cost or (Profit)	1829	1798	370	41	(690)	(750)	(825)	(907)	(997)	(1094)	
Accumulated Net Cost or (Profit)	1829	3627	3997	4038	3448	2698	1873	966	(31)	(1125)	(17,535)

[a]Adjusted for the reduced yield shown here of 3.3 tons, as per BE's Ex. SP 121.
[b]All revenue, cost, and annual profit numbers are constant from year 10 on.

Grape Calculations Using Bozick's 300 Lug Yield, Bozick's Prices, and 25% Increased Pre-Harvest Costs

YEAR	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	25[c]
Yield — tons per acre	—	—	1.8	2.4	3.3	3.3	3.3	3.3	3.3	3.3	3.3	3.3	3.3	3.3	3.3	3.3	
Gross Income — 1091/ton	—	—	1964	2618	3600	3600	3600	3600	3600	3600	3600	3600	3600	3600	3600	3600	
Pre-Harvest Cost[a]	1625	1358	1189	1346	1346	1346	1346	1346	1346	1346	1346	1346	1346	1346	1346	1346	
Depreciation	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	
Interest on Investment — 10%																	
Irrigation System	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	
Building, Equip., Tractor	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	
Interest on Accumulated Net Cost	—	215	426	493	533	504	472	436	398	355	308	256	199	137	68	—	
Harvest Cost[b]	—	—	491	653	900	900	900	900	900	900	900	900	900	900	900	900	
Payment Capacity (Water Delivery Cost)	331	331	331	331	331	331	331	331	331	331	331	331	331	331	331	331	
Total Annual Cost	2154	2102	2635	3021	3308	3279	3247	3211	3173	3130	3083	3031	2974	2912	2843	2775	
Net Annual Cost or (Profit)	2154	2102	671	403	(292)	(321)	(353)	(389)	(427)	(470)	(517)	(569)	(626)	(688)	(757)	(825)	
Accumulated Net Cost or (Profit)	2154	4256	4927	5330	5038	4717	4364	3975	3548	3078	2561	1992	1366	678	(79)	(904)	(8329)

[a] Increased 25% over Ex. SP 121.
[b] Adjusted for reduced yield, as per SP 121.
[c] All revenue, cost and annual profit numbers are constant from year 16 on.

Grape Calculations Using Maddock's Price of $869/Ton

YEAR	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	25[b]
Yield — tons per acre	—	—	2.1	2.8	3.85	3.85	3.85	3.85	3.85	3.85	3.85	3.85	3.85	3.85	3.85	3.85	3.85	
Gross Income — 869/ton	—	—	1825	2433	3346	3346	3346	3346	3346	3346	3346	3346	3346	3346	3346	3346	3346	
Pre-Harvest Cost	1300	1086	951	1077	1077	1077	1077	1077	1077	1077	1077	1077	1077	1077	1077	1077	1077	
Depreciation	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	
Interest on Investment — 10%																		
Irrigation System	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	
Building, Equip., Tractor	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	
Interest on Accumulated Net Cost	—	183	363	421	457	434	408	380	349	315	278	236	191	141	86	26	—	
Harvest Cost[a]	—	—	573	761	1050	1050	1050	1050	1050	1050	1050	1050	1050	1050	1050	1050	1050	
Payment Capacity (Water Delivery Cost)	331	331	331	331	331	331	331	331	331	331	331	331	331	331	331	331	331	
Total Annual Cost	1829	1798	2416	2788	3113	3090	3064	3036	3005	2971	2934	2892	2847	2797	2742	2682	2656	
Net Annual Cost or (Profit)	1829	1798	591	355	(233)	(256)	(282)	(310)	(341)	(375)	(412)	(454)	(499)	(549)	(604)	(664)	(690)	
Accumulated Net Cost or (Profit)	1829	3627	4218	4573	4340	4084	3802	3492	3151	2776	2364	1910	1411	862	258	(406)	(1096)	(66

[a] Reduced for the reduced yield shown here of 3.85 tons.

[b] All revenue, cost and annual profit numbers are constant from year 17 on.

TABLE OF CONTENTS

Page

I. "Omitted Lands":
Modification of the allocation of water for use on the five Indian Reservations, within conceded boundaries, is proper under Article IX of the 1964 Decree 3

A. Introduction 3

B. Article IX authorizes the modification of the amount of water allocated to use on the five reservations 6

C. The Special Master correctly concluded that the Court should modify the allocations to the Tribes 9

II. "Boundary Lands":
The adjusted boundaries of the Indian Reservations have been sufficiently "finally determined: to justify the allocation of water for the practicably irrigable acreage included within the restored or added lands 22

A. Introduction 22

B. The 1964 and 1979 Decrees contemplated that boundary adjustments would be treated as final for water allocation purposes when settled by formal administrative decisions or court judgments binding on the Interior Department 23

C. Independently of the 1964 and 1979 Decree provisions, the boundary adjustments should be treated as sufficiently determined for water allocation purposes 28

III. "Sandy and gravelly/cobbly lands" and "water power lands":
Properly applying the burden of proof to the claimants, the Special Master correctly resolved the factual disputes relating to yields, production costs and power costs in determining the practical irrigability of these lands 31

A. Introduction 31

Contents—Continued

	Page
B. The Special Master correctly resolved the factual issues relating to yields and production costs for sandy, gravelly and cobbly lands	36
C. The Special Master correctly resolved the factual issues relating to power costs	38
Conclusion	40
Appendix	1a

TABLE OF AUTHORITIES

Cases:

	Page
Arizona v. *California*, 373 U.S. 546	4, 17, 19, 20, 24
Arizona v. *California* (Decree), 376 U.S. 340	3, 4, 6, 22, 29, 31
Arizona v. *California* (Order amending Decree), 383 U.S. 268	4
Arizona v. *California* (Supplemental Decree), 439 U.S. 419	4, 5, 11, 21, 23, 31
Arizona v. *California* (Order), 440 U.S. 942	24
Bryant v. *Yellen*, 447 U.S. 352	20, 21
California v. *Nevada*, 447 U.S. 125	29
Cappaert v. *United States*, 426 U.S. 128	9, 20
Cragin v. *Powell*, 128 U.S. 691	26
Cramer v. *United States*, 261 U.S. 219	22
Hudson v. *West*, 47 Cal. 2d 823, 306 P.2d 807	8
Johanson v. *Washington*, 190 U.S. 179	26
Knight v. *United States Land Association*, 142 U.S. 161	26
Lane v. *Darlington*, 249 U.S. 331	26
Masterson v. *Pacific Livestock Co.*, 144 Or. 396, 24 P.2d 1046	8
Morgan v. *Udy*, 58 Idaho 670, 79 P.2d 295	8
Shoshone Tribe v. *United States*, 299 U.S. 476	21
Trinchera Irrigation District v. *First Nat'l Bank*, 106 Colo. 128, 102 P.2d 909	8
Utah v. *United States*, 394 U.S. 89	29
United States v. *California*, 332 U.S. 19	22
United States v. *Creek Nation*, 295 U.S. 103	21
United States v. *Mason*, 412 U.S. 391	21

Cases—Continued Page

United States v. *Mitchell*, 445 U.S. 535 21
United States v. *Santa Fe Pacific R. Co.*, 314 U.S. 339 22
United States v. *Schurz*, 102 U.S. 378 26
United States v. *Sioux Nation of Indians*, 448 U.S. 371 21
Washington, State of v. *Fishing Vessel Association*, 443 U.S. 658 19
Westminster, City of v. *Church*, 167 Colo. 1, 445 P.2d 52 8

Statutes:

Colorado River Basin Project Act, 82 Stat. 887, 43 U.S.C. 1521 10
Omnibus Adjustment Act of 1926, 44 Stat. 649, 43 U.S.C. 423 20

Miscellaneous:

Arizona Republic, May 6, 1982 ..... 12, 1a
S. Rep. No. 408, 90th Cong., 1st Sess. (1967) 13

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 8, Original

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON EXCEPTIONS TO THE SPECIAL MASTER'S REPORT

REPLY BRIEF FOR THE UNITED STATES

We have previously filed our own limited Exceptions to the Special Master's Report, together with a Supporting Memorandum, and do not now re-argue those points. Nor need we repeat our Statement of the case. The present brief is confined to answering the arguments advanced by the State Parties in aid of their Exceptions to the Report. [1]

Those Exceptions are many and challenge almost every major recommendation entered by the Master. One subject of complaint by the State Parties is the ruling allowing the sever-

[1] See Exceptions of the States of Arizona, California, and Nevada and the other California Defendants to the Report of Special Master Elbert P. Tuttle and Brief of Said Parties in Support of Exceptions (hereafter "State Parties' Brief"); Exception of the State of Arizona to the Report of Special Master Tuttle dated February 22, 1982 and Brief in Support of Exception (hereafter "Arizona's Brief"); and, Exceptions of the California Agencies to the Report of Special Master Elbert P. Tuttle; Brief of Said Parties in Support of Exceptions (hereafter "California Agencies' Brief"). See, also, Brief of Amici Curiae, Salt River Project Agricultural Improvement and Power District, Salt River Valley Water Users' Association and Arizona Public Service Company.

al Tribes to intervene and to participate in the proceedings through their own counsel—a matter of practical importance because some tribal claims to diversion rights not put forward by the United States were allowed by the Master. See Report at 25-27, 109-110, 117-121, 197-277. Although we have at all times supported the right of the affected Tribes to speak for themselves and continue to do so, we deem it appropriate to leave to them the burden of responding to the present objections to the Master's acquiescence to their intervention. For our part, we restrict ourselves to defending the challenged recommendations of the Report which sustain the claims of the United States. See Report at 106-117, 125-196.

1. We address first (*infra*, at 3-22) the Exceptions contesting the Special Master's decision that Article IX of the 1964 Decree is properly invoked to allocate additional water rights in respect of practicably irrigable lands within the conceded boundaries of the Indian Reservation for which no such rights were awarded in the earlier proceedings. In the special circumstances — including the long deferred adjudication of competing non-Indian Present Perfected Rights, the absence of any serious detrimental reliance by the State Parties on the 1964 quantification of Reservation diversion rights, and the concededly substantial irrigable acreage entitled to water under the established standard — we argue that consideration of these "omitted land" claims was both permissible and appropriate.

2. Next (*infra*, at 22-31), we turn to the Exceptions challenging the Special Master's conclusion that additional diversion rights may now be adjudicated on the basis of lands determined to lie within Reservation boundaries after the 1964 Decree had been entered. The only question on this score is whether boundary adjustments declared by formal administrative decisions or final court judgments are sufficiently "finally determined" within the meaning of Article II(D)(5) of the 1964 Decree to support the water allocations now recommended. We agree with the Special Master that such "boundary lands" are presently entitled to be treated as part of the

several Reservatons, subject only to possible later challenge in appropriate proceedings in another forum.

3. Finally (*infra*, at 31-39), we briefly answer lesser Exceptions challenging certain factual determinations of the Special Master so far as they involve the successful claims of the United States. Specifically, we deal with the complaint that the Master misapplied the burden of proof and committed error by preferring, as more reliable and more convincing, the evidence of the experts of the United States who, it is said, overestimated the crop yields to be expected from certain lands and underestimated the production costs of farming those lands, as well as the cost of power where pumping or pressure irrigation was required. These Exceptions, we note, reach less than 11 percent of the acreage for which diversion rights were allowed by the Master on the claims of the United States.

I

"OMITTED LANDS": MODIFICATION OF THE ALLOCATION OF WATER FOR USE ON THE FIVE INDIAN RESERVATIONS, WITHIN CONCEDED BOUNDARIES, IS PROPER UNDER ARTICLE IX OF THE 1964 DECREE

A. Introduction

The State Parties vigorously protest the Special Master's conclusion that, boundary changes aside, Article IX of the 1964 Decree in this case, 376 U.S. 340, 353, authorizes a modification of the water allocations to the five Indian Reservations. And, even if the power exists, they argue that it should not have been exercised in the present situation. We respond to both points. But, at the outset, we stress what the State Parties ignore: that the Special Master's ruling should be judged in the particular context, especially the relative *timing* of the requested modifications. Only when the "omitted land" claims are seen in perspective, is it possible to appreciate that this is not an untimely attempt to unsettle a comprehensive adjudication concluded many years ago, upon which all in-

terested parties have relied as permanently fixing water rights in the affected States.

1. The rights to the use of water which the United States holds for the benefit of the Indian inhabitants of these five Reservations are "Present Perfected Rights" within the meaning of the Boulder Canyon Project Act. 373 U.S. 546, 600. [2] But other water users also hold Present Perfected Rights to water aggregating over three million acre-feet of diversions—almost three times the total allocated to the five Indian Reservations. See Supplemental Decree of January 9, 1979, 439 U.S. 419. The inter-relationship between those non-Indian Present Perfected Rights and the Present Perfected Rights which the United States holds on behalf of the Indian Tribes has always been recognized in this litigation. Obviously, all Present Perfected Rights must be fixed before the Secretary can finally determine the amount of water available for allocation to other users. Yet, the fact is that quantification of non-Indian Present Perfected Rights was not finally accomplished until 1979, after the Tribes and the United States had requested modification of the amounts decreed as Indian Present Perfected Rights. See Report at 20-25.

To be sure, all parties had envisioned a far quicker resolution of the problem. Special Master Rifkind's recommended decree called for the submission to the Court within two years of lists of all Present Perfected Rights claimed by the States and the Secretary of Interior. Disputes were to be resolved by application to the Court. A similar provision was submitted to this Court as an "agreed provision" [3] and was included in the 1964 Decree. Art. VI, 376 U.S. at 351-352. As it happened, however, even a listing of those rights within two years was impossible and the Decree was amended to extend the deadline.

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[2] "Present Perfected Rights" are defined in the 1964 Decree in Art. I (G) and (H), 376 U.S. at 341. Under the terms of the 1964 Decree, Present Perfected Rights, for all practical purposes, have first call on the River and are virtually guaranteed a full supply of water. See, *e.g.*, 373 U.S. at 584; Decree, Art. II (B)(3), 376 U.S. at 342.

[3] Agreed Provisions for Proposed Final Decree (December 1963).

383 U.S. 268 (1966). Not until the entry of the 1979 Decree was the issue of non-Indian Present Perfected Rights finally resolved. But, by that time, both the United States and the Tribes had raised their contentions that the allocations for the Indian Present Perfected Rights did not include sufficient water to irrigate all the practicably irrigable acreage on the five Reservations. That circumstance, quite naturally, was treated by the Special Master as critical to his determination that Article IX was timely invoked. Report at 55-56.

Nor was the entry of the 1979 Decree finally quantifying non-Indian Present Perfected Rights a mere formality, confirming what everyone knew to be the other preferred claims on the mainstream of the lower Colorado River. The fact is that, in filing their lists of Present Perfected Rights with the Court and the Secretary of the Interior in 1967, both California and Arizona claimed quantities very substantially greater than were ultimately recognized by the 1979 Decree. Thus, California then asserted Present Perfected Rights (not including those for Indian Reservations) totalling 3,039,407.7 acre-feet of consumptive use [4] and Arizona asserted like rights totalling 399,358.52 acre-feet of consumptive use. [5] Assuming a one-third return flow, these figures translate to approximately 4.5 million and 600,000 acre-feet of diversions, respectively. Yet, the 1979 Decree recognized only 2,863,051 acre-feet of mainstream diversions to satisfy non-Indian Present Perfected Rights in California and 298,003 acre-feet of diversions for non-Indian Present Perfected Rights in Arizona. 439 U.S. at 423-435. The difference—almost 2 million acre-feet of diversions—highlights the degree of uncertainty that prevailed until after the present Indian claims were asserted. And, of course, by comparison, the total recommended additional allocation to the Reservations (some 317,000 acre-feet of diversions) seems almost insignificant.

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[4] See List of Present Perfected Rights in the State of California (Excluding Federal Establishments) Pursuant to Article VI of the Decree (filed March 9, 1967).

[5] See List of Present Perfected Rights Submitted by the State of Arizona (filed March 9, 1967).

The State Parties fail to comment on this aspect of the request by the United States and the Tribes to complete the Reservation allocations. They accuse the Master of establishing a "disruptive legal precedent" (State Parties' Brief at 36), without noticing the special setting in which he deemed it appropriate to invoke Article IX. That situation will not recur. Now that all Present Perfected Rights are quantified, it will be very difficult for any claimant to justify disarranging the status quo.

2. At all events, the present claims are not nearly as disruptive as the State Parties contend. As characterized by the Master, the modifications recommended are "relatively minor adjustments of the kind which might legitimately be expected in the aftermath of a much larger original case." Report at 55. Moreover, the request does not seek to change the previously adopted quantification standard of allocating sufficient water to irrigate the practicably irrigable acreage on each Reservation. All that was asked, and allowed, was a correction of omissions in applying the established standard.

B. Article IX Authorizes The Modification Of The Amount Of Water Allocated To Use On The Five Reservations

In determining the extent of the jurisdiction retained by Article IX, Special Master Tuttle found the language of the Article persuasive. [6] In his words (Report at 34-35):

> The best indicator of the scope of Article IX is thus its very language. On its face Article IX would permit very broad modifications of the 1964 Decree. Certainly it contains no limiting language. In the absence of more convincing arguments, I believe that the Court, by employing a broadly-drafted Article IX, retained the power to make virtually any modification in its 1964 Decree that it deemed proper "in relation to the subject matter in controversy."

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[6] Article IX of the 1964 Decree (376 U.S. at 353) provides:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modifica-

The State Parties acknowledge the sweeping scope of the language (Brief at 24), but contend that the otherwise expansive terms of Article IX do not apply to the provisions of the earlier Decree allocating water to the five Indian Reservations. Nothing in the wording of the Article hints at such a limitation. Nor did any of the parties at the time suggest such a one-sided construction of the Decree. Indeed, the only submission which discussed Article IX called for a broad provision which would avoid any potential problem with modifying the Decree. Supplement and Amendment to Imperial Irrigation District's Form of "Decree of Court" as Heretofore and Herewith Submitted at 11 (Dec. 1963). See Report at 33 n.5.

The State Parties nevertheless argue that Special Master Rifkind's decision to fix the allocation of water for the Reservations forecloses the subsequent application of Article IX to that portion of the litigation. To be sure, the previous Master rejected the notion of an open-ended decree for the Reservation allocations. But his adoption of a permanent standard which would quantify the amount of water to be allocated to the Reservations does not debar us from invoking Article IX to ensure that the chosen standard was applied correctly.

Special Master Tuttle persuasively disposed of the contention by the State Parties that Article IX must be so limited. After reviewing the record before his predecessor, the Master concluded that the former Master actually may have included Article IX in part precisely to permit a modification of the Indian allocation in light of the suggestion by the United States that it may have understated the Tribes' rights. Report at 53. At all events, in adopting a broadly worded Article IX, the former Master and the Court gave absolutely no indication that the allocation to the Indian Reservations were uniquely exempted from its terms. In those circumstances, it would be most unusual to now attempt to restrict the plain terms of the provision.

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tion of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

The Special Master also examined outside authority for guidance in interpreting Article IX. See Report at 33. Although the Master noted that provisions similar to Article IX are found in the decrees of this Court for other interstate water cases, he recognized that those precedents "merely illustrate that the Court may make even major modifications of decrees in cases over which it has retained jurisdiction." *Ibid.* The State Parties argue (Brief at 28-32) that reliance on these cases is inappropriate because, in some instances, the Masters' Reports allegedly qualify the scope of later modifications. However that may be, there is no similar limitation here. The contention that the language of Article IX must be read as not applying to Article II(D)(1)-(5)—which governs the allocation of the five Indian Reservations—ignores the fact that the parties, the Master, and the Court were perfectly capable of fashioning a provision which had the limited effect now urged by the State Parties. See Report at 34.

After fully considering the contentions of the Parties, the Master found that "[t]he best indicator of the scope of Article IX" was its language. Report at 34. To so read the provision is wholly consistent with an established pattern in water adjudications. As the Master notes, "water rights decrees often include a retention of jurisdiction which may be used to adjust the water rights decreed in the event an error is discovered." Report at 47. [7] We rest on the Master's conclusion that the Court had retained jurisdiction to make the modifications urged by the Tribes and the United States. See Report at 34-35.

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[7] In addition to the authorities there cited by the Master, we call the Court's attention to several decisions indicating that courts in the West do not uniformly adhere to rigid notions of finalty in water adjudications. See, *e.g.*, *Hudson* v. *West*, 47 Cal. 2d 823, 831, 306 P.2d 807, 811 (1957); *Masterson* v. *Pacific Livestock Co.*, 144 Or. 396, 403, 24 P.2d 1046, 1049 (1933); *Morgan* v. *Udy*, 58 Idaho 670, 79 P.2d 295 (1938); *Trinchera Irrigation District* v. *First Nat'l Bank*, 106 Colo. 128, 102 P.2d 909 (1940); *City of Westminster* v. *Church*, 167 Colo. 1, 445 P.2d 52 (1968).

C. The Special Master Correctly Concluded That The Court Should Modify The Allocations To The Tribes.

Of course, power to modify the 1964 Decree does not necessarily mean that it should be exercised. See Report at 35. Only after carefully weighing all relevant factors, did the Master conclude that he would recommend that the Court exercise the authority retained in Article IX to provide the Tribes with the full amount of water to which they are entitled under the standard previously adopted by the Court.

The Master did not reach this conclusion casually or hastily. He held the question in abeyance throughout the hearings, invited the State Parties to make their best showing, and only after hearing all relevant evidence, came to a final decision. The Master's Report devotes considerable discussion to determining the extent of the reliance by the State Parties on the 1964 allocations. Ultimately, however, the Master concludes that the unfairness to the Tribes of an admittedly erroneous quantification of their water rights is not outweighed by the showing of reliance by the State Parties. Report at 38-46. The record fully supports that result.

At the outset, it is important to be clear about the appropriate inquiry. The issue is *not* whether confirming the additional water rights for "omitted lands" awarded by the Master will affect water users in the three States. See *Cappaert* v. *United States*, 426 U.S. 128, 138-139 (1976). Rather, the only relevant consideration weighing against exercising discretion to now correct past mistakes is a showing by the State Parties that they would have acted differently if diversion rights for the "omitted lands" awarded by the Special Master in 1982 had been adjudicated as part of the original decree in 1964. Unless it is established that the States and their water users relied to their detriment on the 1964 Decree, they have been more advantaged than harmed by mere postponement of the final reckoning. And, of course, we must look beyond a simple belief, however firmly held, on the part of non-Indian claimants that the Reservation allocations were immutably frozen by the 1964 Decree. What matters is how, if at all, they

acted to their detriment in reliance on that premise—whether by undertaking commitments or foregoing opportunities. Only then is there something to balance against the equities in favor of amending the old Decree to afford the Tribes their full share of mainstream water.

The evidence presented by the State Parties as to detrimental reliance is far from overwhelming. As the Master stated, it is "difficult to determine from the testimony exactly what significant, different action the State Parties would actually have taken if the Indian Reservations had received in 1964 the water rights now requested." Report at 46. Indeed, it can fairly be said that so far as the Master credited the State Parties' reliance argument, he did so more on the basis that they "must have" relied on the Decree to some extent, rather than on the strength of any evidence actually in the record. *Ibid.*

1. The Master's conclusion that Arizona may have relied to its detriment on the 1964 Decree seems overly generous. As the Master notes, the question of Arizona's purported reliance on the earlier allocation focuses on the Central Arizona Project, a massive federal project designed to transport Colorado River water to the central portions of Arizona. See Colorado River Basin Project Act, 82 Stat. 887 (1968); 43 U.S.C. 1521. Arizona now argues that it relied to its detriment on the allocation of Indian water rights in the 1964 Decree in connection with this Project. But the record does not sustain the claim. [8]

There is no basis whatever for supposing that the Project would have been aborted if the "omitted lands" claims sustained by the present Master had been recognized in 1964. Indeed, Arizona does not dispute the Master's express finding to the contrary. Report at 40. Nor is it suggested that the

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[8] We note that Arizona now attempts to bolster the record by gratuitous statements regarding Congressional and State reliance on the 1964 Decree in formulating the Project—material the State unsuccessfully sought to put into evidence through oral testimony. Tr. 2690-2692.

Project will be discontinued as a result of the belated recognition of Indian rights. Moreover, at the time of trial, construction of the aqueduct from the Colorado River to Central Arizona was only 60% complete and delivery of water was not expected until 1985. Tr. 2760. Prior to the initiation of the requests for modification of the 1964 allocation no water had been finally allocated from the Project. Tr. 2708. The repayment contract between the United States and the Central Arizona Water Conservancy District has never been validated and, thus, Arizona water users are under no obligation to repay any of the costs of the Project. Tr. 2760-2761; see also Tr. 2693-2694. Although Arizona asserts (Brief at 26) that Congress has appropriated over 932 million dollars for construction of the Project, only $625,000 has been advanced by the State; the remainder has been paid by the United States. Tr. 2760. The upshot is that water users in Central Arizona cannot claim to have relied on the receipt of any water from the Project. Nor are they committed to the repayment of the costs.

As the Master acknowledges, the thrust of Arizona's claim of detrimental reliance is simply that confirmation of additional rights for the Tribes will ultimately affect the quantity of water available for the Project. But this reality hardly demonstrates detrimental reliance. A host of other factors affect the availability of water for the Project. As previously mentioned, all Present Perfected Rights assume a priority over the Project. Yet, not until 1979 was the issue of non-Indian Present Perfected Rights resolved, and, until then, Arizona itself claimed 300,000 more acre-feet of Present Perfected Rights than were ultimately recognized by the 1979 Decree. See List of Present Perfected Rights Submitted by the State of Arizona (filed March 9, 1967). [9] This excess is, of course, far greater than the

[9] As we have noted, Arizona's 1967 List, claiming almost 400,000 acre-feet of Present Perfected Rights, is stated "in terms of consumptive use" (at 2). Assuming a one-third return flow, this would require diversions from the mainstream of approximately 600,000 acre-feet. The 1979 Decree, on the other hand, recognized less than 300,000 acre-feet of diversions to satisfy non-Indian Present Perfected Rights in Arizona. 439 U.S. at 423-427. We note that Arizona

aggregate of all additional diversion rights allowed by the Master in respect of Reservation lands in Arizona, and almost twice the allocation for "omitted lands." [10]

In addition, substantial disagreement exists between Arizona and the Bureau of Reclamation over the water supply available for CAP. Tr. 2765. The rate of development in the Upper Basin of the Colorado River is critical in determining the available supply. That development has been far less than expected during the planning stages of CAP and more water is available for CAP than originally anticipated. Tr. 2769-2771. In fact, Wesley Steiner, the Director of the Arizona Department of Water Resources, has stated that the recent abandonment of oil shale development in Colorado will release "more than enough" water to offset the recognition of additional rights for Tribes in this case. [11] The Arizona Republic, May 6, 1982, at B 1, 5. [12] There is also a continuing dispute over the amount of depletions from the River in Arizona, as well as over the proper techniques for operating the regulatory structures on the River. Tr. 2765-2775. The Bureau of Reclamation con-

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did not promptly revise its claim. On the contrary, as late as December 13, 1972, the State filed with the Court a Supplemental List of Present Perfected Rights, adding some 35,000 acre-feet of gross diversions—in effect, an "omitted land" claim of its own.

[10] Subject to perhaps minor correction, it appears that in respect of the "omitted land" claims sustained by the Special Master (on both the claims of the United States and the Tribes) some 169,091 acre-feet of diversion rights would be charged against Arizona's share (a minimum of 2.8 million acre-feet of consumptive use). Assuming a one-third return flow, the actual loss to CAP on account of the allowance of the "omitted lands" claims would be approximately 112,727 acre-feet. The diversion rights recommended by the Master for "boundary lands" in Arizona (on the claims of the United States and the Tribes) total about 20,255 acre-feet, or about 14,500 acre-feet of consumptive use.

[11] Mr. Steiner was the only witness who testified as to Arizona's reliance on the Decree.

[12] A copy of this Article is included as an Appendix, *infra*.

cludes that the Project has available a firm supply of 400,000 acre-feet. Tr. 2767. Arizona predicts a much larger firm supply of 550,000 acre-feet of water. Tr. 2766. Indeed, following Arizona's analysis, even after recognition of the additional rights for the Tribes, more water will be available for the Project than was anticipated by Congress during the authorization of the Project. See Report at 39-41; Tr. 2703, 2706-2707; S. Rep. No. 408, 90th Cong., 1st Sess. 18-21 (1967) (in evidence as U.S. Exh. 161).

Finally, it is clear that the increased water allocations for the Indian Reservations will have no significant financial impact on the revenues available to the State to repay Project costs. If the State attempts to make up the lost revenue through increased charges to Project agricultural water users, that would amount to an additional 34.5 cents per acre-foot. Tr. 6052-6053. If the rates charged for power obtained from the facilities at Hoover Dam were to be increased, homeowners in the Central Arizona area would only be required to pay an additional 46 cents per year. Tr. 6053-6054.

In sum, Arizona's claims of reliance are unpersuasive. There is simply nothing to indicate that Arizona would have acted differently if the diversion rights for "omitted lands" had been recognized in 1964, rather than now.

2. The only California party to argue reliance on the 1964 Decree was the Metropolitan Water District. Again, the Master was most generous in recognizing that, to some extent, MWD may have relied on the 1964 Decree.

Before the Master, MWD argued that after 1964, the District moved to acquire additional water sources to offset its losses to the Indian Tribes. Motion to Reject the Omitted Lands Claims at 31. But the record does not support that contention. Indeed, it is now admitted that the District took steps to offset its losses to Arizona, but ignored its losses of 55,000 acre-feet of consumptive use to the Tribes. State Parties' Brief at 48-50. That, we are told, is because the allocation to the Tribes was viewed as "relatively minor." *Id.* at 50.

In the circumstances, it is difficult to credit the present claim that the District's plans would have been substantially differ-

ent had it foreseen an additional allocation for "omitted lands" in California amounting to less than 16,000 acre-feet of consumptive use [13]—not even one-third the "relatively minor" amount "lost" to the Tribes in 1964. On the contrary, as the Master notes, those responsible for planning for the District even at the time of trial did not seem concerned about the possible recognition of additional tribal rights. Report at 43; Tr. 2943-2944.

3. The Master was unequivocal about the failure of Nevada to show that it had detrimentally relied on the 1964 allocation. The fact is that Nevada, in its planning process, had set aside 12,500 acre-feet of water for consumptive use by the Fort Mojave Tribe—whose Reservation alone among the five involved here includes lands within Nevada. Report at 44-45. That amount, as the Master stated, was more than sufficient to satisfy the additional rights claimed by the Tribe and the United States, as well as the rights recognized in 1964. Report at 45 and n.55.

Nevada's current speculation that there will be no return flow from diversions to Reservation lands in Nevada is unsupported by the record. Every expert who testified about the impact of recognizing additional water rights for the Tribes acknowledged that the diversions would exceed the depletion or consumptive use. See FM Exh. 1; State Parties' Brief at 50 (one-third return flow in California); Tr. 2752; Report at 40 n.25, 44-45. Nevada's attempt to correct its expert's failure to understand that the amounts decreed to the Tribes in 1964 were for gross diversions, not net depletion, is most extraordinary given the nature of the parcels of land on the Fort Mojave Reservation in Nevada. One parcel, FM-1, is

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[13] The State Parties calculate the total additional allocation to Indian lands in California at 123,314 acre-feet of diversions. Brief at 50. But, of this amount, only approximately 23,000 acre-feet are attributable to "omitted lands." And, as the State Parties acknowledge *(ibid.)*, return flow is reasonably estimated at one-third. Accordingly, additional consumptive use for "omitted" Indian lands within California is less than 16,000 acre-feet.

immediately adjacent to the River and contains sandy lands. See FM Exh. 2, plate 1. The other unit, FM-3, the Master found to overlie a groundwater acquifer which is connected to the mainstream of the River. The result, of course, is that the irrigation return flows from these parcels will indeed return to the River.

The truth is that Nevada has not fully committed its share of Colorado River water. Thus, the State envisions using uncommitted diversion rights for future developments in two areas. Tr. 3001, 3004. Almost 10,000 acre-feet of uncommitted water is available for these potential developments. Report at 45; Tr. 3023. This is, of course, far more than is needed to satisfy the additional rights claimed in Nevada by the United States and the Tribes. Obviously, then, Nevada has not relied to its detriment on the 1964 Decree.

4. Although they speak of reliance on the 1964 Decree, the real concern of the State Parties is with respect to the *future impact* of the additional claims on their water allocations. Arizona specifically states that it "finds no discernable difference between the inquiry concerning 'detrimental reliance' and that of 'detrimental impact' * * *." Arizona's Brief at 30. See also State Parties' Brief at 50-52, which discusses the impact on the MWD and Nevada. The Master, of course, recognized that "What the Tribes gain someone else will lose, at least in the future." Report at 38 (footnote omitted). But the proper inquiry here, as the Master notes, is detrimental reliance. *Ibid.* The State Parties' reiteration of conclusionary statements, unsupported by the record, regarding the effect of the loss of their access to the water does not transform future impact into past reliance.

At all events, the record does not reflect that the State Parties will be detrimentally affected to any substantial extent by the present awards to the Tribes. In Arizona, for example, the testimony of Mr. Steiner, the Director of Water Resources, showed that the per capita use of water in the City of Phoenix is twice that of Tucson. The reason for the difference is the additional amount of water used to water grass, trees and shrubs in Phoenix. If Phoenix were to lower its rate to that of

Tucson, more than enough water would be released to cover the claims for the Tribes. Tr. 2793-2795; U.S. Exh. 93. The State Parties, as they did before the Special Master, argue that the award of additional rights for use on the Indian Reservations will affect the Metropolitan Water District. Although MWD holds the most junior priority of the California interests and, thus, theoretically will be affected by the recognition of any additional senior rights, the record does not show the actual amount of water which will be denied to the District. At worst, as we have noted (*supra*, at 14), it cannot exceed 16,000 acre-feet on account of the "omitted lands" claims sustained by the Master. There is no basis for supposing that the District, which currently uses 1,300,000 acre-feet of water (Tr. 2919), could not satisfy its needs out of the over 2.5 million acre-feet to which it has contractual entitlements from the State Water Project and the Colorado River. Tr. 2914, 2920-2921.

The record establishes that the impact of the recognition of these claims will be minimal. Presently, no shortage of water exists on the River and the River is full from top to bottom. See, *e.g.*, Tr. 2839-2841, 2958. In fact, the water supply imposes no limitation on the development of new lands in the Palo Verde Irrigation District in California. Tr. 4973.

5. The Special Master did not lightly conclude that the "omitted lands" claims were open to consideration. But, at the end of the day, he determined that factors on the other side of the balance made unyielding adherence to the 1964 allocation inappropriate. Report at 47.

First, of course, Article IX on its face demonstrates that the 1964 allocation was not totally immutable. Even the State Parties agree that, at least with regard to boundary lands, they could expect increased allocations to Indian Tribes. Other changes could have been expected as well, since, as the Master notes, the Parties perceived Article IX as a reservation of authority to correct any mistakes subsequently discovered. Report at 47. And, given the "number of complex issues and difficult matters of proof," at least some mistakes could be anticipated. *Ibid.*

Most compelling for the Master was the uncontested existence of substantial "omitted lands" entitled to water rights under the established standard. Concededly, a large majority of the "omitted lands" for which water rights are claimed by the United States are practicably irrigable. Report at 47. Unless the rules are changed, the Tribes are entitled to have their rights quantified on the basis of the practicably irrigable acreage on their Reservations. It would be a more radical step now to reject the established standard because of a marginally greater impact on non-Indian water users in 1982 as compared to 1964. Certainly, the need for water on these Reservations is no less today than it was in 1963 when this Court stated that "water from the river would be essential to the life of the Indian people * * * and the crops they raised." 373 U.S. at 599. Special Master Rifkind carefully articulated his reasons for settling on the practicably irrigable standard. Report of Dec. 5, 1960 at 260-266. Those reasons were previously accepted by the Court and are equally persuasive today. See 373 U.S. at 600-601. As the former Master stated, "the United States intended to reserve enough water to make the lands productive, in other words, enough to irrigate all the practicably irrigable acreage. Only by reserving water in this manner could the United States ensure that the Reservation lands would be useable to an Indian economy." Report of Dec. 5, 1960 at 262.

6. To be sure, the State Parties now assert that some, if not all, the "omitted lands" today deemed "practicably irrigable" would not have been so viewed at the time of the proceedings before Special Master Rifkind. State Parties' Brief at 40-45. It is said that the "evidentiary criteria" have been altered (*id.* at 42) because "the passage of a quarter of a century has improved soil classification science and irrigation technology" (*id.* at 43). This is a new claim, not presented, much less proved, during the trial before Master Tuttle, and only suggested after the record was closed. See Report at 51. [14] But, at all events, the point is wholly without merit.

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[14] At one point, the State Parties did offer proof seeking to establish the limited acreage that could feasibly have been irrigated under nineteenth-century techniques, known when the Reservations were

Contrary to the implication in the State Parties' Brief that a significant portion of the United States' case rested on the "more modern" Soil Conservation Service (SCS) Standards, the fact is that most of the evidence of irrigability presented by the United States in the current proceedings was based on the same BIA standards developed for this litigation a quarter century ago. Tr. 116, 117; U.S. Exh. 1 at p. 2. The SCS standards were only applied to the disputed sandy lands which the State Parties concede encompass only 1,750 acres. Tr. 127; State Parties' Opening Post Trial Brief at 11. In significant measure, the lands now awarded water rights are merely omitted portions of units declared irrigable in the earlier proceedings. See, *e.g.*, U.S. Exh. 42 at p. 45. And, in other cases, it is obvious that non-irrigability was not the reason for excluding the omitted lands before Special Master Rifkind. Report at 48-52 and n.63.

Nor do we believe the result should be different if it could be shown that some lands are practicably irrigable today but were not twenty years ago. Presumably, technological advances alone ought not call for re-opening a complete decree. See Report at 98 n.23. But it hardly follows that when, for independent reasons, new lands are examined for irrigability, outdated tests artificially should be used. Just as Special Master Rifkind applied then current criteria of practical irrigability, so Special Master Tuttle was right to look to present technology. See Report at 98. Any other approach is impractical. [15] Moreover, since the premise of the "practicably

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established. The present Special Master, like his predecessor, firmly rejected this approach. Report at 97-98 and n.24. That suggestion now appears to have been abandoned by all the State Parties, except perhaps Arizona. See Arizona's Brief at 36-39, B-1 to B-5.

[15] Before the Master, all parties presented evidence which was based on current farming practices and technology. An investigation of irrigation feasibility in the 1950's would entail more than simple adherence to the BIA Soil Standards. A determination of crop prices, labor costs, power rates and a host of other factors for the time period would also be required. Compare U.S. Exh. 60. The State Parties introduced no evidence relative to such issues. And, as the Master

irrigable" standard is to provide for "the future as well as the present needs of the Indian Reservations" (373 U.S. at 600), it would be quite wrong to exclude lands known to be irrigable today. Indeed, to the extent that it can safely be predicted, one ought to take into account *future* improvements in technology. Certainly, actual knowledge cannot be disregarded. After all, the purpose of the exercise is to determine what lands can be irrigated for the benefit of the present and future generations, not to revive some past historical situation, as of an arbitrary date. [16]

In truth, the State Parties are urging abandonment of the "practicably irrigable" standard. Unless the Tribes can show an immediate and pressing need for water, they contend there is no basis to modify the Reservation allocations. But this ignores the very reason that the practicably irrigable standard was chosen: It was the one method by which the Tribes' present and future needs could be assured of being met and still achieve the much desired finality. [17] Our plea is only that this standard be applied correctly.

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notes, "[r]eference to past standards would introduce an additional complication in an already complex case." Report at 98. Moreover, nothing in the existing record indicates that fewer lands would be considered irrigable under the older techniques. For example, power rates, it must be conceded, would have been significantly lower at that time.

[16] Of course, the argument cuts both ways. In our view, it would be equally wrong to attempt to recreate an irrigation system that once was, but is no longer, feasible—because significant physical changes have intervened or the cost of power or necessary facilities have substantially increased.

[17] Arizona expressly asks the Court to adopt a different standard. Arizona's Brief at 31-36. According to Arizona, this Court's decision in *State of Washington* v. *Fishing Vessel Association*, 443 U.S. 658, 685-687 (1979), required the Master to consider evidence regarding Reservation income levels and other related matters designed to demonstrate the amount of water needed to provide a "moderate living." The Master refused, noting that "the prior Master rejected such arguments which would tie the quantity of water to present

7. Finally, the Special Master was influenced by the circumstance that the United States was seeking to correct its error, not for its own benefit, but on behalf of Indian Tribes who were not participants when the original allocations were made. In our view, that approach was right, even though we admit no conflict of interest embarrassing the Government's

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needs." Report at 90-91 n.5. And, indeed, this Court expressly disapproved any approach that would balance the relative needs of the Tribes and affected non-Indians. *Arizona* v. *California*, *supra*, 373 U.S. at 596-597; see, also, *Cappaert* v. *United States*, *supra*, 426 U.S. at 138-139.

At all events, there is no reason to believe that the inquiry would result in the allocation of a different quantity of water for use on the Reservations. For example, the Colorado River Reservation presently has approximately 23,000 tribal members. Tr. 1416. Thus, under the 1964 allocation, water was available to irrigate 48 acres per member. Under Special Master Tuttle's recommended allocation, the equivalent figure is 59 acres. The figures for the other Reservations are lower:

	Population	Irrigated Acres per Capita 1964 Allocation	Irrigated Acres per Capita Master's Allocation
Ft. Mojave	723 (Tr. 1383)	26	34
Chemehuevi	400 (Tr. 1433)	5	9
Fort Yuma	1,700 (Tr. 1445)	4.5	11.5
Cocopah	465 (Arizona's Brief A-2)	.9	5.9

And, of course, the population of the Reservations is expected to increase significantly in the future. The value of each irrigated acre is difficult to establish, but certainly is not as high as suggested by Arizona's offer of proof. See Tr. 1418-1423. At any rate, these amounts do not appear extravagant when the 160 acre limitation in federal reclamation law is considered. See Section 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649; 43 U.S.C. 423e. Needless to say, the Reservation allocations are very modest when compared to those enjoyed as Present Perfected Rights by the farmers of the Imperial Valley, exempted from that limitation. See *Bryant* v. *Yellen*, 447 U.S. 352 (1980).

representation of the Tribes in the earlier proceedings, much less any impropriety committed by counsel. At least if, as we believe, the Court retained jurisdiction to make the adjustments now sought, the decision whether to exercise that power properly may take into account that the victim was not responsible for the unjust result and in no position to prevent it.

After all, although the United States as guardian of the Tribes has broad powers to administer their property and to represent their interests in litigation, it has no authority to alienate their rights to others without compensation or to sacrifice them to other concerns, whether by accident or by design. *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497-498 (1937); *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935). Sometimes, to be sure, a partial remedy is afforded through a later monetary award against the United States. *E.g.*, *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980). But even such relief—never wholly satisfactory—is not available unless a "taking" in the Fifth Amendment sense has occurred or Congress has clearly so provided. See *United States* v. *Mitchell*, 445 U.S. 535 (1980). Moreover, here, we concede no breach of fiduciary duty and the accountability of the United States in damages would be strongly resisted. See *United States* v. *Mason*, 412 U.S. 391 (1973). Most likely, the Tribes must remain remediless in any other forum. [18] At all

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[18] We accordingly reject the facile solution offered by the State Parties for the Tribes' predicament: "Let them sue the United States in the Court of Claims." See State Parties' Brief at 53-55. We wholly fail to understand the alternative suggestion of Amici Curiae (Brief at 26) that any "tribal deficiency" be made up by reducing "the water allocated to the United States." The only diversion rights adjudicated in the 1979 Decree in favor of "Federal Establishments" other than Indian Reservations is a single award of 500 acre-feet to the Lake Mead National Recreation Area in Nevada. 439 U.S. at 436. We are aware of no other presently quantified federal diversion rights against the mainstream of the lower Colorado, unless the several federal irrigation projects are included. We cannot suppose the beneficiaries of the Salt River Project would suggest that the Present Perfected Rights of the Imperial Valley farmers be diminished to satisfy the Indian claims. See *Bryant* v. *Yellen*, *supra*.

events, where a more direct correction of the error is not clearly foreclosed, it should be allowed for the benefit of the ward even if the guardian could not recapture its own property in like circumstances. Cf. *Cramer* v. *United States*, 261 U.S. 219, 233-234 (1923); *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 355-356, 360 (1941).

The situations in which the United States is estopped because of the default of its agents are rare enough even when its own proprietary interests are involved. Compare *United States* v. *California*, 332 U.S. 19, 39-40 (1947). Such exceptions ought be even fewer when the adversely affected rights are merely held in trust for another. That is especially so, it seems to us, in the context of Indian water rights, so essential to implementing the one consistent strand in congressional Indian policy: the attempt to encourage Indian agriculture—whether in the name of "civilizing" or "assimilating" the Indian population or in order to provide the Tribes a measure of self-sufficiency. Denying the Reservations their full quota of water because of past governmental default is more than injustice to the intended beneficiaries; it also implicates the Nation's assumed obligation toward a dependent people and impedes the achievement of long-standing public policy.

For these several reasons, we submit the Master's recommendation to utilize Article IX to correct the allocation of water to the Tribes is fully justified.

II

"BOUNDARY LANDS": THE ADJUSTED BOUNDARIES OF THE INDIAN RESERVATIONS HAVE BEEN SUFFICIENTLY "FINALLY DETERMINED" TO JUSTIFY THE ALLOCATION OF WATER FOR THE PRACTICABLY IRRIGABLE ACREAGE INCLUDED WITHIN THE RESTORED OR ADDED LANDS.

A. Introduction.

Article II(D)(5) of the 1964 Decree, 376 U.S. at 345, expressly provided that the Colorado River diversion rights of the Fort Mojave and Colorado River Indian Reservations would

be "subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." And Prefatory Paragraph (5) of the 1979 Supplemental Decree, 439 U.S. at 421-422, borrowing the same language, made clear that such an adjustment should likewise occur if the boundaries of the other Reservations are "finally determined" to include additional areas. The same provision of the 1979 decree expressly specified the method by which supplemental diversion rights shall be computed: by multiplying the number of "net practicably irrigable acres" by the previously established "unit diversion quantities" (the required acre-feet of water for each acre) for each Reservation. *Id.* at 422. Thus, the only question presented here is whether the Special Master was correct, as we believe, in concluding that the several boundary adjustments considered were sufficiently "finally determined" for present purposes. [19]

We address primarily the issue of the Court's intent in adopting the cited provisions of the 1964 and 1979 Decrees. We then briefly respond to the apparent suggestion that, whatever those Decrees contemplated, the Court ought now to reconsider and require further judicial proceedings before allocating water for the boundary lands.

B. The 1964 And 1979 Decrees Contemplated That Boundary Adjustments Would Be Treated As Final For Water Allocation Purposes When Settled By Formal Administrative Decisions Or Court Judgments Binding On The Interior Department.

1. After some vacillation, all the State Parties joined in urging the Court to direct its Special Master to himself review all disputed boundary questions and recommend a resolution to

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[19] Although the State Parties as a whole (Brief at 60-66), and certain California Agencies in particular (Brief at 18-65), discuss the merits of the boundary determinations at some length, they apparently recognize that this Court ought not, at this stage, review those decisions. See State Parties' Brief at 4, 128; California Agencies Brief at 67.

this Court. See Response of the States of Arizona, California, and Nevada and the Other California Defendants to the Motion of the United States for Modification of Decree at 22-26 (Feb. 1979). Since the Court's Order referring our Motion for Modification included no instruction on this score (see 440 U.S. 942), the State Parties renewed their plea directly to the Master. Report at 57. In light of what occurred in the prior proceedings, it is hardly surprising that the Master declined the invitation.

a. At the time of the proceedings before Special Master Rifkind, most of the boundaries of the several Indian Reservations had been administratively defined by the Department of the Interior. Although no court, much less this Court, had reviewed the administrative action, the State Parties accepted these boundaries for water allocation purposes. Indeed, it presumably did not occur to them to say that, absent judicial approval in this Court—or any court—the boundaries were not "final."

The boundary question arose because the United States, speaking through the Department of Justice, asserted wider boundaries for two of the Reservations than the Department of the Interior had yet officially approved. As Special Master Rifkind fully understood, the stance of the Government's advocates in litigation is hardly equivalent to a formal ruling of the Interior Solicitor, endorsed by the Secretary, or to a land survey entered and approved by the Department with statutory authority in the premises. Such was the posture when the former Master heard and determined the Government's boundary arguments.

Presumably, Master Rifkind should have declined to look beyond the Interior Department's public decisions and simply rejected our claims as not yet officially recognized. Instead, the Master undertook to decide the boundary questions *ab initio*. That was the mistake which led the Court to state in its opinion (373 U.S. at 601):

> We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation. We

hold that it is unnecessary to resolve those disputes here. [20]

Very clearly, it seems to us, the Court was saying that its Master ought not have attempted to do the job of the Secretary of the Interior. Although the Master had obviously given extended consideration to the matter and recommended a "final" resolution, the Court would not endorse his proposed answer. On the contrary, when the Decree was entered, it expressly left the matter open for a later "final determination."

In this setting, it is not really possible to read the Decree as postponing the issue for later decision by the Court itself. Why not seize the opportunity to approve or disapprove the Master's detailed opinion if, sooner or later, the Court must face the question? As we understand the Court, it was saying that boundary determinations were not for this Court, then or later.

b. At all events, the text of the 1964 Decree, repeated in the 1979 Supplemental Decree, forecloses the idea that the Court would itself finally determine Reservation boundaries. The relevant provision refers to the *water* adjustment being accomplished by a "decree *of this Court*," but it does not go on to say that this would occur after the boundaries have been finally determined "by this Court." And, indeed, it would have been wholly superfluous to provide that, absent agreement, the Court would adjust the water allocation in the event the Court itself determined a change in boundary. That would go without saying.

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[20] The Court added *(ibid.)*:

> Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time.

This statement is at odds with the Decree subsequently entered and, we must assume, was superseded by the injunction effectively prohibiting the Secretary from delivering water to the disputed boundary areas *until* their status as Reservation lands was "finally determined." See Report 66-67 n.89. But the opinion does emphasize the Court's view that boundary determinations were primarily an adminstrative matter, for decision by the Interior Department.

Moreover, the Decree adverts to the possibility that the parties will adjust the diversion rights "*by agreement*" in the event a new boundary is fixed. But if the Court itself is to finally determine such boundaries (as well as the number of irrigable acres within the "restored" boundary area), why speak of agreeing the consequences? One does not agree to carry out a Supreme Court decision, at least when the implementing formula is fully recited in the original Decree. Presumably, the reference to an agreed adjustment in the water allocation contemplates the situation in which the Court might be spared *any* occasion to act, because a new boundary has elsewhere been fixed and the parties have stipulated the additional irrigable acreage involved and, therefore, the appropriate water allocation adjustment.

2. The question remains how a Reservation boundary becomes "finally determined," if not by this Court. The case of the lands added by Congress to the Cocopah Reservation in June 1974 is plain enough. See Report at 63. But what of the other adjustments, resulting from administrative action or final district court judgments? See Report at 57-63.

a. Although they took a different stance before the Master, the State Parties now seem to be reviving the suggestion that the Reservation boundary questions ought to be adjudicated in adversary proceedings involving the States in the federal district courts, if not here. Indeed, very belatedly, one such action has been filed. California Agencies' Brief at 17 and n.12. But whatever the availability of such a forum, we deem it plain no such proceedings are necessary to vindicate the effectiveness of final administrative determinations.

There is no basis for requiring judicial review of administrative boundary determinations before they may be deemed "final." The actions now sought to be challenged implement the traditional authority of the Interior Department with respect to the public lands. See, *e.g.*, *United States* v. *Schurz*, 102 U.S. 378, 395 (1880); *Cragin* v. *Powell*, 128 U.S. 691, 697-699 (1888); *Knight* v. *United States Land Association*, 142 U.S. 161, 177-178 (1891); *Johanson* v. *Washington*, 190 U.S. 179, 185 (1903); *Lane* v. *Darlington*, 249 U.S. 331, 333 (1919). For more than a

century, the Executive Branch has created, added to, defined, and surveyed Indian Reservations, and no one has suggested that these actions were not effective until judicially approved. See Report at 68-71. Indeed, as already noted, no party here questioned the "finality" of the Reservation boundaries as they were understood when the case was first filed merely because no court had reviewed them.

b. There is no precedent for requiring the United States to initiate an action to quiet its title or to vindicate the correctness of its determination whenever the boundary of an Indian Reservation is defined or redefined. And, on the other hand, it is obviously impossible to deny effective finality to a boundary determination indefinitely because the affected State has not chosen to challenge it judicially. At the least, as the State Parties themselves once told the Court, if resolution of the boundary controversies "must occur piecemeal in lower courts, [y]ears could pass before every dispute is finally determined through the appellate process." Response of the States of Arizona, California, and Nevada and the Other California Defendants to the Motion of the United States for Modification of Decree at 23 (Feb. 1979). The Court cannot be supposed to have created such an impasse to the allocation of the additional water to the Reservations whose boundaries were corrected.

3. We suggest the 1964 Decree was distinguishing between a mere *claim* advanced by the United States in litigation and a formal Interior Department ruling purporting finally to resolve an open question. Admittedly, the Secretarial orders now before the Court are administratively final. They amount to adjudications. An appropriate district court may perhaps entertain a complaint that the decision reached was arbitrary or capricious. But, short of that, the administrative determinations are binding and final, so far as they go. [21] We submit they fully qualify as "final determinations" for the purposes of this case.

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[21] We have no occasion to consider the effect of the Secretarial orders on claims of *title*, whether advanced by a State or private parties. Before the Special Master, no State property claim was

A fortiori, we believe, the judgments affecting the Fort Mojave and Cocopah Reservations must be treated as final determinations. They are final judgments, accepted by the Department of the Interior. Until and unless another court reaches a different result, the boundaries now established must be treated as "finally determined."

C. Independently Of The 1964 And 1979 Decree Provisions, The Boundary Adjustments Should Be Treated As Sufficiently Determined For Water Allocation Purposes.

We submit the relevant provisions of the Decrees entered in 1964 and 1979 plainly require the present allocation of water rights to the areas now determined, by formal administrative decisions or final court judgments, to lie within the boundaries of the several Indian Reservations. Having so concluded, the Special Master was bound to act accordingly and to decline the invitation to review the merits of the boundary determinations. But the Court itself is, of course, free to change its mind. The vehemence of the epithets hurled at the Master on this score may amount to such a suggestion on the part of the State Parties. If so, we urge the Court to adhere to its previous ruling.

1. We note, first, the inconsistent stance of the State Parties. They urged the Master to examine and disallow the boundary adjustments. But, having failed to pursuade him to undertake that task, they now seem content to postpone the issue to other litigation—which, with one exception, they are in no haste to initiate—provided the boundary adjustments are deemed ineffective for water allocation purposes in the interim. This submission comes, we stress, from the same parties who so vigorously insist that certainty and stability are essential to their own water distribution plans. Obviously, the

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advanced within the "boundary lands." See Report at 74. The very belated objection now made—not by the State of California itself—is impossible to assess on the existing record. See California Agencies Brief at 66. But, in any event, all title questions remain open under the Master's Recommended Decree. See Report at 282-283.

safer path to avoiding difficult retrenchments at some later date, predictably accompanied by renewed pleas of detrimental reliance, is *now* to allocate the appropriate diversion rights to the Reservation "boundary lands," subject to being set aside if and when the boundary adjustments are successfully impeached.

That course is especially appropriate in light of the presumption of correctness attaching to formal decisions of the Interior Department in relation to the public land and Indian affairs, and, of course, the presumptive validity of final court judgments. What is more, it is far from clear that standing and jurisdictional obstacles will not insulate the boundary determinations from collateral attack. And, finally, because the Indian Tribes have not yet been able to put to actual use their full allocations, any retrenchment of their rights, if not unduly delayed, will be less disruptive to them than to the State Parties. [22]

2. More fundamentally, we submit the Court was wise to leave the question of boundary determinations to the Department of the Interior and ought not now adopt a different solution.

In 1963, the Court evidently believed it need not exercise its unusual original jurisdiction—always to be invoked "sparingly"—to resolve subsidiary questions as to the true boundaries of each Indian Reservation. Cf. *Utah* v. *United States*, 394 U.S. 89, 95 (1969); *California* v. *Nevada*, 447 U.S. 125, 133 (1980). For like reasons, we assume, the Court followed the same approach with respect to private title claims within the Reservations which derived from pre-Reservation land grants. See Art. II(D)(5), 376 U.S. at 345. It need hardly be said that this concern not to overburden the Court with peripheral matters is all the more important today, when both

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[22] Of course, the State Parties presently enjoy, and will continue to enjoy, any surplus the Tribes do not put to beneficial use. But no claim of reliance can be made with respect to this interim "borrowing" of Indian water rights.

the original and appellate dockets of the Court have swollen substantially.

3. We do not say that, in 1964 or 1979, the Court ruled out the possibility of judicial proceedings in some other forum. But, as we have sought to show, there is no basis whatever for supposing the Court believed judicial vindication of decisions normally left to the Interior Department would be a prerequisite to treating boundary adjustments as "finally determined." To be sure, as foreign observers noted long ago, the litigious habits of this Nation tend to bring every question before a court sooner or later, and that trend has increased in our day. Yet, it has never been the American rule that no formal decision by other branches of the Government is binding until it wins a judicial imprimatur. Indeed, although there are a number of court decisions dealing with the boundaries of Indian Reservations, the overwhelming majority of such boundaries are effective for all purposes without judicial approval—including, of course, those accepted in the prior proceedings in this very case. At the least, once a formal administrative decision has been entered, it must be treated as final until and unless it is upset in appropriate proceedings. It will not do simply to declare, as the State Parties do: "We do not accept that ruling until you obtain judicial confirmation."

If that was the understanding in 1964, there is all the more reason to adhere to it today. In one case (the so-called "Benson Line" decision affecting the Colorado River Reservation, see Report at 61, 295-296), the Secretary of the Interior entered his formal decision more than thirteen years ago. Like Secretarial orders or approved resurveys were entered in respect of other boundary adjustments in 1974 and 1978. See Report at 58-59, 61-62, 286-287, 297-303. And two district court judgments affecting boundaries were rendered in 1975 and 1977. See Report at 59, 62-63, 288-291, 292-294. Each of these decisions is final and has been fully implemented. The lands affected have been treated for all purposes as part of the respective Reservations. It is an anomaly that appurtenant

water rights have not been recognized. [23] But there is surely no justification for delaying still longer the necessary modification to the Decree defining the Reservation's water rights to reflect the normal consequence of Reservation status. [24]

III

"SANDY AND GRAVELLY/COBBLY LANDS" AND "WATER POWER LANDS": PROPERLY APPLYING THE BURDEN OF PROOF TO THE CLAIMANTS, THE SPECIAL MASTER CORRECTLY RESOLVED THE FACTUAL DISPUTES RELATING TO YIELDS, PRODUCTION COSTS AND POWER COSTS IN DETERMINING THE PRACTICAL IRRIGABILITY OF THESE LANDS

A. Introduction.

With remarkable boldness, the State Parties ask this Court to review the Special Master's particularized findings with respect to certain categories of land which he held practicably irrigable, to disallow those awards, and to revise the result

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[23] Under the Court's 1964 Decree, the Secretary of the Interior remains enjoined from delivering water to the Reservations in respect of those boundary lands, even though "finally determined," except "by agreement or decree of this Court." Art. II(D)(5), 376 U.S. at 345; see, also, 1979 Supplemental Decree, Prefatory Paragraph (5), 439 U.S. at 421. Since no agreement has been possible, we have sought an appropriate Decree from this Court to implement the boundary adjustments for water allocation purposes. No one disputes the necessity for such action by the Court.

[24] We dismiss as obviously frivolous the argument that the 1979 Decree treated the earlier administrative decisions and court judgments as not having "finally determined" the boundary adjustments already made. See State Parties' Brief at 63; California Agencies' Brief at 14. The language of that Decree, copied from the 1964 Decree, merely carried forward, without purporting to resolve, the disagreement of the parties as to what constitutes a "final determination." It is disingenuous to argue from the Court's entry of the 1979 consent decree, which deliberately left the issue in suspense, that the Court was construing or revising its earlier Decree in this respect.

accordingly. State Parties' Brief at 78-116 and Table I. This is suggested in the face of an exceptionally thorough Report, reflecting careful consideration of all the issues now complained of, and after what must be judged a very full and fair evidentiary hearing. What is more, the end-product of the laborious re-evaluation the Court is invited to undertake, even if wholly successful for the State Parties, would be relatively minor: on their own figures, the sustained claims of the United States would be reduced only by some 22,000 acre-feet. *Id.*, Table I, facing page 116. Nevertheless, we address the objections briefly, so far as they relate to the awards recommended by the Master on the claims advanced by the United States.

The major thrust of the State Parties' complaint as to the successful claims of the United States is that the Master overestimated the crop yields from sandy and gravelly or cobbly lands and underestimated the production costs of farming those lands. State Parties' Brief at 88-92. A second alleged error relates to three units of "marginal" lands on the Fort Mojave Reservation, as to which the Master is accused of underestimating power costs by failing to include a charge for "wheeling." *Id.* at 92-94. We will deal with those questions in a moment. But, at the outset, we respond to the more general charge, said to underlie these mistaken awards: that the Master failed to hold the United States and the Tribes to their burden of proof (*id.* at 79-85); and that he was guilty of "conceptual error" in positing a theoretical "best farmer" in assessing the practical irrigability of the lands claimed (*id.* at 85-87, 89).

1. The first obstacle to the State Parties' argument as to the burden of proof is that the Master expressly endorsed the standard which the State Parties suggested. At the very beginning of his discussion of the factual issues (Report at 88), he states:

> The United States and the five Tribes have sought to prove that certain lands are practicably irrigable. They bear the burden of persuasion. The State Parties have noted that the claimants must establish their asserted

> points by a preponderance of the evidence. This is the standard of proof which I believe to be clearly appropriate and which I shall use to judge all claims.

Thus, the complaint must be that the Master did not faithfully follow the rule he announced. On this score, we submit, it is the State Parties who bear the burden of persuasion. They have not come close to meeting it.

At bottom, the State Parties are quarreling with the Master's conclusion that, on most issues, the experts for the United States were more convincing. Quite naturally, the United States' case in chief focused on the investigations conducted by experts in the fields of soil science and land classification, agricultural engineering and agricultural economics. Each expert testified about the scope of his study and written reports containing the conclusions of his investigations were produced in evidence. U.S. Exhs. 1, 42, and 60. In addition, various other exhibits were introduced which supported the conclusions reached by the three experts. And, predictably, the State Parties countered with like expert testimony relative to the characteristics of the soils on the Reservations, the cost of developing them for irrigated agriculture, the returns available from farming the parcels identified, and, ultimately, the economic feasibility of irrigating the land in question. The task which confronted the Master was to sort through the lengthy record and to determine which of the conflicting opinions he found most persuasive. It is no ground for complaint that the Master credited one set of experts more than another.

Nor was this an arbitrary choice. The Master patiently heard and considered a mass of expert evidence. Inevitably, at some point, he was required to rely on the opinion of the expert witnesses. And, of course, in some instances, the Master found himself satisfied that the United States, through its experts, had met its initial burden of proof, subject to more persuasive evidence from our opponents. He cannot be faulted for failing

to prefer vague or misleading, or simply less convincing, expert opinion from the State Parties. There is in this nothing justifying the charge that the Master applied a "dual standard."

One example sufficiently illustrates the point. The State Parties quarrel with the Master's rejection of their claim that the United States' expert erred in his choice of sprinkler pressures. State Parties' Brief at 81. But the Master sufficiently explained his resolution of this issue. His Report discusses this minor topic for more than three pages (Report at 176-179). Finally, he concludes (Report at 179):

> Under these circumstances, I find the United States' expert to be more credible. The United States has the burden of proof on this issue and introduced competent evidence supporting its position. Some of the links in the rationale behind its position do not appear in my review of the testimony. But the conclusions were offered by an expert witness whose testimony was never revealed to be seriously in error or misleading. His opinion appears to be the more sound.

In contrast, the Master found that the testimony of the expert for the States Parties was "incorrect and misleading." Report at 178. [25] Under these circumstances, the Master cannot be faulted for accepting the United States' evidence.

2. We need not tarry over the charge of "conceptual error" against the Master insofar as he accepted yield estimates based on the experience of "best" farmers, rather than "average" farmers. As the Master points out, he accepted the economic analysis of the United States' expert, who was "unusually qualified," who had actual experience as a farmer, who had undertaken "a comprehensive and detailed analysis," including

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[25] As the Master outlines, on direct examination, the expert for the State Parties testified that his research had revealed that 30 PSI was the *minimum* sprinkler pressure at the pivot which could be considered acceptable. His notes, produced during cross-examination, showed that his research demonstrated that 30 PSI was the *typical* pressure, not the minimum. Report at 178.

interviews with farmers in the area and a personal visit to each parcel under consideration. Report at 135-136. In the Master's view, "the lengthy and impressive experience" of this agricultural economist "was simply unmatched by any other witness in this case." *Id.* at 135.

It is in this context that we must judge the alleged "conceptual error." We note that the State Parties overstate (Brief at 86) when they attribute to the Master acceptance of "*best*" farmer yields: in fact, he found the United States' expert to have relied on the experience of "*better*" farmers. Report at 141. For the rest, we invoke the Master's final observation in agreeing with the agricultural economist tendered by the United States *(ibid.)*:

> I am also convinced that his overall theoretical approach is the most sound as well. His decision to emphasize the yields of the better farmers was consistent with economic theory. As the only true economist to testify, this expert provided the most convincing evidence upon which I can base a judgment regarding whether his use of the better yields and high-level management is consistent with a proper economic inquiry. I should note, however, that his conclusions accord with what I consider to be the sensible approach, because the present inquiry concerns the ability of the lands to produce crops profitably, not the likelihood of any particular person, average or otherwise, to succeed in such an operation. If the land can profitably be farmed by anyone, considering *all* relevant cost and benefits, the land might beneficially be irrigated.

There is, moreover, another justification for looking to the yields obtained by better farmers today. As the United States' economist stated, they are representative of the yields which the average farmer will obtain in ten years. U.S. Exh. 60 at 9; Tr. 866. Thus, the current yields of better farmers represent the returns available to average farmers over the life of the proposed project. *Ibid.*; Tr. 788-789, 5990-5995.

B. The Special Master Correctly Resolved The Factual Issues Relating To Yields And Production Costs For Sandy, Gravelly And Cobbly Lands.

The State Parties' complaint that the Master overstated the yields to be expected from sandy and gravelly or cobbly lands, and underestimated the costs of farming these lands (Brief at 88-92) is largely an elaboration of the accusation that the agricultural economist for the United States was too easily credited. We need not repeat what has already been said in answer to that charge. Only a few additional comments are appropriate.

The topic of "gravelly" and "cobbly" lands was hotly debated and a considerable amount of evidence was directed toward the resolution of the issue of the irrigability of such lands. They were classified as irrigable under the land classification standards used by the United States' expert. See U.S. Exhs. 1, 3, 6. After those lands were questioned by the State Parties, the United States' soils expert rechecked his classification. Report at 147; Tr. 128-129, 138-156; U.S. Exhs. 23, 25-32, 22 DD, 22 EE, 22 GG, 22 HH, 22 KK, 22 AAA, 22 BBB, 22 CCC. The other experts for the United States also considered the soil characteristics of the disputed parcels in connection with the development of their analysis as to the irrigability of these lands. [25] The Master expressly found the land to contain less gravel than claimed by the State Parties. Report at 147. He then discussed in considerable detail the evidence relating to the soil characteristics of each of the disputed units containing gravelly land. *Id.* at 148-157. Ultimately, the Master reached his conclusion in these words (*id.* at 157-158):

> This issue eventually turns upon the soils classification of the two competing experts. The United States' soils experts classified these lands as irrigable under the objec-

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[25] See, *e.g.*, Tr. 5716 where the United States' agricultural engineer states that he is not overly concerned by the gravelly nature of the soils in question here. The United States' economist visited each parcel claimed by the United States to examine the soil characteristics. Tr. 764, 793.

> tive BIA Standards designed for the soil in the lower Colorado River Valley. The standards used by the State Parties' soils expert may be derived from his lengthy experience in soil classification, but those standards are certainly ill-defined and incapable of objective verification. As indicated above, I believe that the State Parties and their experts also have overstated to some extent the degree of rockiness of these soils. The United States appears to have more correctly classified these lands in soil categories that indicate their suitability to farming. Other lands containing a significant degree of gravel and cobble are now farmed at nearby locations.

Obviously, the Master cannot be faulted in this respect. Nor can he justly be criticized for preferring the careful assessment by the United States' agricultural economist as to the appropriate yields for sandy and gravelly lands. Report at 134-141, 159-160. Contrary to the State Parties' contention, the United States' expert did not base his sandy and gravelly land yields merely on the reduction ratios in one publication, but considered a variety of factors, including yields actually achieved on such lands in the area. Tr. 777-780; Tr. 5997-5998, 6056-6068. Report at 140. Unsurprisingly, his yield estimates were preferred over those of the State Parties' expert whose analysis was "almost exclusively based on a publication which appears to be somewhat dated and thus not likely to render a reliable yield figure by itself." *Id.* at 140.

The Master's Report (at 141-145, 159-160) speaks for itself on the topic of production costs for such lands. We add only that the State Parties are mistaken in arguing that the Master's rejection of their experts' projected increased production costs was simply a one-sided refusal to accept opinion evidence. See State Parties' Brief at 81-85, 90-91. Instead, he plainly stated that he was "more convinced by the United States' economist's opinion that many of these costs would not increase as projected by the State Parties * * *." Report at 143. The description of the State Parties' evidence as "vague and unconvincing" (Report at 142) has firm support in the record. See Tr. 3706-3707, 3892-3905, 4342-4343, 4409.

Indeed, the Master was quite specific in articulating his reasons for rejecting the State Parties' assertion of increased

production costs. For example, it was implied that the United States failed to include in its estimate certain costs associated with the sprinkler irrigation of the sandy lands. But, as the Master noted, "[t]he United States has always proposed sprinkler systems for irrigating these sandy lands and has clearly indicated the costs estimated to be appropriate for such on-farm systems as projected." Report at 144, citing to Tr. 490-494, 5604-5605, 5841-5843, U.S. Exh. 42 at 30-35, 37, Table 7, Table 10, app. B, app. C. The State Parties did not design on-farm systems, but took "a per-acre cost estimate." Report at 144. Hence, the Master found that "[t]he State Parties' presentation regarding the cost of sprinkler irrigation systems hardly impairs the persuasiveness of the United States' detailed cost analysis." *Ibid.* In these circumstances, the Master was fully justified in relying on the cost figures projected by the United States' experts.

C. The Special Master Correctly Resolved The Factual Issues Relating To Power Costs.

The State Parties argue that the Master erred in accepting the power rate of 30 mills estimated by the United States' experts because those experts projected a general rate for use on all five Reservations. State Parties' Brief at 87, 92-93. The State Parties later urge that the Master was wrong in rejecting their allegation that the United States failed to account for "wheeling" or transportation costs in projecting power rates. State Parties' Brief at 93-94. Those criticisms are unconvincing in light of the record established by the United States and the Master's findings on the issue of the proper power rate.

As the Master notes, the United States' estimate considered various power rates available to users in the vicinity of the Reservations, including a 23 or 24 mill rate available to preference power customers on the Colorado River Reservation, a draft contract rate of 40 mills for the Fort Mojave Reservation and the 28 to 29 mill rate offered by Arizona Public Service. Report at 173. Accordingly, the Master found the United States' estimate to be "fair." *Ibid.* The State Parties posited

the same criticisms before the Special Master as they do here. The Master found their concerns unpersuasive since nothing in the record supports the contention of counsel for the State Parties that the United States' experts failed to account for wheeling costs. Report at 173-174. [27]

The Master found added support for his conclusion in the failure of the State Parties to present a credible alternative to the rate proposed by the United States. In the Master's view, the State Parties' estimates contained a "fatal flaw" because they were based on higher rates which did not take effect until after the time period in question. Report at 175. [28] In short, the Master was correct in rejecting the State Parties' argument because it was unsupported by the record. The reiteration of that contention here is no more persuasive.

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[27] The State Parties refuse to acknowledge the basis for the 30 mill power rate adopted by the United States' expert. That rate was based on the various rates available during the critical summer months of 1979. No need existed to consider additional wheeling costs because that rate was considered available throughout the area. Counsel for the State Parties insist that a wheeling charge must be added to this rate but no evidence supports that contention.

[28] The United States' evidence demonstrated that crop price increases would have offset these higher costs. Report at 176, citing Tr. 6024-6025.

CONCLUSION

The several Exceptions of the State Parties should be overruled and, with the modifications suggested by the Exceptions of the United States, the Special Master's recommendations should be approved and the proposed Decree entered by the Court.

Respectfully submitted.

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APPENDIX

THE ARIZONA REPUBLIC
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Shale-project demise to free water for CAP

Would offset any boost for tribes, official says

By Mary A.M. Perry
Republic Staff

Exxon Corp.'s decision to drop a $5 billion oil-shale project in Colorado will release "hundreds of thousands" of acre-feet of water to Arizona for the Central Arizona Project, the director of the state Department of Water Resources said Wednesday.

Director Wesley Steiner refused to say exactly how much water would be made available. However, he said it would be "more than enough" to offset an additional 120,000 acre-feet per-year share from Arizona's Colorado River water that might go to five Indian tribes if the U.S. Supreme Court upholds a March opinion by a federal judge.

"The U.S. energy independence may be further down the road from Exxon's decision," he said, "but from the standpoint of Arizona water, it is good."

Exxon announced Sunday that it is pulling out of the $5 billion Colony Project in western Colorado, one of only two remaining commercial oil-shale projects under construction in the United States. The other project is in Parachute Creek, Colo.

The Water Resources Department has estimated that in 1985, the first year Colorado River water will be available to the CAP, 1.6 million acre-feet will be available for water deliveries in Maricopa County.

The amount available to Arizona will decline steadily as states in the river's upper basin develop their water projects. The department estimates about 1.2 million acre-feet will be available in the year 2000.

Colorado is an upper-basin Colorado River water user, while Arizona is in the river's lower basin. Both the federal Bureau of Reclamation and the state water department had counted the Colony project in their water projections for the CAP, Steiner said.

A March 17 opinion issued by U.S. District Judge Elbert Tuttle of Atlanta would give five Colorado River Indian tribes an additional 316,988 acre-feet of water each year. Of this amount, 120,000 acre-feet would come from Arizona's annual 2.8 million acre-feet entitlement.

This water would have to come from the water delivered by the $2.4 billion CAP, Steiner said.

He said the state water department will appeal Tuttle's decision to the U.S. Supreme Court. The state hopes, Steiner said, that the amount granted the Indians will be reduced to only 30,000 acre-feet per year for boundary changes in reservations.

Tuttle's additional water awarded to Arizona Indians was based on lands omitted from a 1964 Supreme Court decision.

The department will argue that the court already decided these lands should be ommited, Steiner said.

In other matters, Steiner said a federal program to augment the Colorado River's annual water supply through cloud seeding has been stalled.

The Department of the Interior will support only the demonstration program if the states pay for it without federal assistance, Steiner said.

"The states see it as a federal responsibility," he told the commission members. "They are not willing to pay for the entire project. I hate to see it die because it may be difficult to revive next year."

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No. 8, Original
IN THE

Supreme Court of the United States

October Term, 1982

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNTIED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

C[illegible]HE REPORT OF THE SPECIAL MASTER.

MOTION OF THE STATES OF ARIZONA, CALIFORNIA, AND NEVADA AND THE OTHER CALIFORNIA DEFENDANTS FOR LEAVE TO FILE BRIEF IN RESPONSE TO REPLY BRIEFS OF THE UNITED STATES AND THE FIVE INDIAN TRIBES; AND BRIEF IN RESPONSE TO REPLY BRIEFS.

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TABLE OF CONTENTS

Page

Motion of the State Parties for Leave to File Brief in Response to Reply Briefs Filed by the United States and the Five Indian Tribes 1

State Parties' Brief in Response to Reply Briefs 7

Summary of Argument 7

Argument 11

I.

The "Omitted Lands" Issue 11

A. Reply Brief of the United States 11

(1) The Real Issue: the Meaning of Article IX 11

(2) The Equitable Issues 12

a) Correction of Allegedly Inadvertent Error 13

b) Allegedly De Minimis and Not Inequitable Effect on State Parties .. 15

1. The Southern Nevada Water Project 18

2. The Central Arizona Project .. 20

3. The Metropolitan Water District 22

4. Present Perfected Rights Argument 23

(3) Consequences of Reopening 26

B. Reply Brief of the Five Tribes 28

Page

II.

The "Boundary Lands" Issue 28

A. Reply Brief of the United States 28

(1) Example of the Original Proceeding ... 29

(2) Authority of the United States to Fix Reservation Boundaries 30

(3) Language of the 1964 Decree 32

B. Reply Brief of the Five Tribes 35

C. Separate Response of the Quechan Tribe 35

III.

Determination of Practicable Irrigable Acreage 37

A. Reply Brief of the United States 37

B. Reply Brief of the Five Tribes 38

C. Separate Response of the Quechan Tribe 42

IV.

Conflict of Interest of United States 46

Conclusion 47

TABLE OF AUTHORITIES CITED

Cases	Page
Arizona v. California, 376 U.S. 340 (1964)	25, 47
Arizona v. California, 439 U.S. 419 (1979)	26, 27
United States v. New Mexico, 438 U.S. 696 (1978)	26, 27
United States v. Trucker-Carson Irrig. Dist., 649 F.2d 1286 (9th Cir. 1981)	11
Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979)	26, 27
Miscellaneous	
House Floor Debate Sept. 5,, 1968, Remarks of Congressman Udall	21
Public Law 90-537, Sc. 301A	21
Senate Report, Sec. 408, pp. 40, 41	21
Treatise	
Wilbur & Ely, Hoover Dam Documents (1948), pp. A479-A483, A507	25

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Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

ON THE REPORT OF THE SPECIAL MASTER.

MOTION OF THE STATE PARTIES FOR LEAVE TO FILE BRIEF IN RESPONSE TO REPLY BRIEFS FILED BY THE UNITED STATES AND THE FIVE INDIAN TRIBES.

The State Parties (the States of Arizona, California and Nevada, and The Metropolitan Water District of Southern California, the Coachella Valley Water District, the Palo Verde Irrigation District, the Imperial Irrigation District,

the City of Los Angeles, the City of San Diego and the County of San Diego) move for leave to file a joint brief in response to the briefs filed by the United States, by the Five Tribes jointly and by the Quechan Tribe in reply to the exceptions and supporting briefs of the State Parties.

1. The order of this Court provided for the filing of exceptions to the Report of Special Master, Elbert P. Tuttle, with briefs in support of exceptions, and reply briefs.

2. Substantive exceptions and supporting briefs, which would set forth their legal positions, were not filed by the United States or the Tribes. As the United States points out, its "Exceptions" relate only to suggested changes to the form of the decree recommended by the Special Master. (Exceptions of the United States, p. 4.) The "Exceptions" filed by the Tribes is merely a statement of concurrence with the exceptions filed by the United States.

3. Following the filing of exceptions of the State Parties, the State of Arizona and The Metropolitan Water District, the United States, the Five Tribes collectively, and the Quechan Tribe filed reply briefs. In these reply briefs the legal positions and arguments of these parties regarding the report of the Special Master are presented for the first time to this Court and to the State Parties.

4. In reviewing the above sequence of the filing of briefs, it is observed that the State Parties have become the "moving party" with respect to objections to the report of the Special Master. Accordingly, consistent with common procedure, the State Parties should have an opportunity to reply to the opposing parties' briefs.

5. The filing of such a brief would be similar to the procedure employed in the original case where opening briefs, answering briefs and reply briefs were filed by the parties.

Based upon the above, the State Parties request leave of the Court to file the accompanying brief in which they respond to the arguments of the United States and the Tribes set forth in the respective reply briefs.

Respectfully submitted,

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No. 8, Original

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

ON THE REPORT OF THE SPECIAL MASTER.

STATE PARTIES' BRIEF IN RESPONSE TO REPLY BRIEFS.

SUMMARY OF ARGUMENT.

In this brief the State Parties respond to the briefs submitted by the United States, the five Indian Tribes, and the Quechan Tribe in reply to the exceptions to the Special

Master's Report and brief in support thereof filed by the State Parties.[1]

Two basic legal themes are presented by the United States and the Tribes in their reply briefs. First, they would have the Court believe that their petition and motions respecting their so-called "omitted lands" claims do not seek to accomplish retrial of the water rights litigation tried before former Special Master Rifkind from 1956-1958 and decided by this Court in 1963. Thus they claim that they are merely applying more accurately the "practicably irrigable acreage" formula for measuring the "reasonable needs" of the Five Tribes, which formula was the subject of that prior adjudication. They further assure the Court that it is a simple matter and only a minor inconvenience to the non-Indian users in Arizona, California and Nevada who would be adversely affected by entertaining and validating those claims. The lengthy record, some 7280 pages reflecting 36 court days over an 8 month period, demonstrates beyond question that a full retrial has taken place; that the claimants have been permitted by the Special Master to reopen a final adjudication after almost a quarter century; and that the proposed awards are extremely harmful to the State Parties who have relied on the 1964 Decree and whose water rights would be diminished.

Second, the United States and the Tribes urge that certain disputed boundaries on the Fort Mojave and Colorado River Reservations left by this Court for later determination, along with a major intervening boundary readjustment on the Fort Yuma Reservation, have been "finally determined" and are

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[1]Reply Brief for the United States (U.S. Reply Brief), Reply Brief of Chemehuevi, Cocopah, Colorado River, Fort Mojave and Quechan Indian Tribes (Reply Brief of the Five Tribes) and Separate Response of the Quechan Tribes (Quechan Brief).

beyond any affected water claimant's right to question. Hence, the parties adversely affected by such new claims would be left in the anomalous position of being permitted to test only the irrigable nature of the so-called "boundary lands" and not whether they are actually within the legislative or executive descriptions of the Indian reservations which are the bases for the additional claimed water rights. Not surprisingly, no authority is cited for so unlikely and unfair a proposition. Rather, its proponents simply extrapolate it from the Secretary of the Interior's authority to survey and fix boundaries of various kinds of federal lands under his jurisdiction. We see no reasonable basis for substitution of the Secretary's administrative survey responsibilities for the requirement that lands whose claimed water right is based upon their being part of an Indian reservation be shown so to be when that status is challenged, as is the case here. The startling position of the United States is but a step away from their urging that the soils classification of claimed reservation lands too is not subject to trial, for soils classification too is an official function of at least three government agencies, the Bureau of Reclamation, the Bureau of Indian Affairs, and the Soils Conservation Service.

As to the practicably irrigable acreage determination, the United States attempts to shield the Master's Report behind the notion that a relatively small portion of its total claim is subject of our Exception and behind the sheer volume and apparent thoroughness of the Report. The Five Tribes take somewhat the same tack and also avoid any real discussion of the Master's critical errors in the determination of almond and grape prices by pointing out the instances in which he ruled against them in an effort to show his fairness. The Quechan Tribe directs itself primarily against strawmen arguments not even raised by the State Parties' Exception and makes elaborate calculations based on in-

applicable Arizona grape prices. The State Parties are not impressed by our opponents' assumptions that they can avoid thorough analysis of our Exceptions in the expectation that this Court will simply not choose to examine any of the Master's errors in factual determinations, no matter how egregious.

Only one brief, that of the Quechans, discusses the alleged conflict of interest of the United States in the original case. No exception was filed relating to this matter and the record fails to support the allegation.

In short, we believe that the legal position of the United States and the Tribes on omitted lands and boundary lands is untenable. They should not be permitted to retry the water rights of the reservations under the misleading description, "omitted lands." Further, they do not meet the prerequisite for seeking adjustment of existing reservation water allocations because disputed boundaries have not been "finally determined" in the context of this litigation. In any case, their analysis of the evidence relating to the practicable irrigability of the disputed lands is seriously flawed. Finally, the Special Master's treatment of the conflict of interest question has not been raised as an issue herein.

ARGUMENT.

I.

THE "OMITTED LANDS" ISSUE.

A. REPLY BRIEF OF THE UNITED STATES.

(1) The Real Issue: the Meaning of Article IX.

In its reply regarding omitted lands, the United States pays relatively little attention to the actual meaning and scope of Article IX of this Court's 1964 Decree (U.S. Reply Brief, pp. 6-8) and instead emphasizes a balancing of equities approach in which the State Parties' detrimental reliance on the 1964 Decree is downplayed while alleged unfairness to the Tribes from failure to relitigate practicable irrigability is played up. (U.S. Reply Brief, pp. 3-6, 9-22). The failure to fully deal with Article IX is understandable. The broad meaning given Article IX by the United States and the Special Master is simply not supportable in light of the record of proceedings before Former Master Rifkind. Article IX does not reserve any jurisdiction to retry the practicable irrigability of lands recognized as part of the Indian reservations at the time of the original lawsuit. (See Exceptions of the State Parties, pp. 23-32). Since no jurisdiction is even reserved, the equitable issue of whether it should be exercised becomes irrelevant. The crucial question therefore is not balancing of equities and detrimental reliance but the meaning of Article IX.[2] Therefore, while we will answer

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[2]The State Parties introduced evidence as to detrimental reliance at trial since it would have been relevant had the Master found a conflict of interest in the United States' representation of the Tribes at the earlier trial (*United States v. Truckee-Carson Irrig. Dist.*, 649 F.2d 1286 (9th Cir. 1981)). However, a balancing of equities approach has no relevance to the applicability of *res judicata* and even under the Master's rationale, applies to the discretionary exercise of jurisdiction under Article IX only if Article IX is misread to reserve such jurisdiction.

the United States' reliance and fairness arguments, we emphasize their conditional relevance.

The United States offers little argument as to the meaning of Article IX and simply adopts the Special Master's reliance on the absence of limitations of any kind in its language. It contends that "in those circumstances, it would be most unusual to now attempt to restrict the plain terms of [Article IX]." (U.S. Reply Brief, p. 7). This contention is defective, however, because it ignores the genesis of Article IX. Indeed, the Special Master elsewhere concedes that "the context in which [former Master Rifkind] wrote [Article IX] is important." (Spec. Master's Rep., p. 53). An indisputable overriding objective of the former master was to establish with finality the totality of the Tribes' reserved water rights. With the context of this objective, the United States' arguments about the "plain terms" of Article IX fall flat.

(2) The Equitable Issues.

Only if Article IX is misread do we reach the balancing of equities approach used by the Master and argued by the United States. In its arguments, the United States attempts to gloss over the fundamental questions of law inherent in asking this Court to consider the omitted lands claim by contending (1) that the objective of the claim is merely to correct an inadvertent mistake that occurred in the prior proceeding, and (2) that such correction would have a *de minimis* and not inequitable impact on the State Parties. It argues, in effect, that the justiciability of the omitted lands claim should somehow turn on the magnitude of the relief sought and not on the legal ramifications inherent in the reconsideration of a previously adjudicated issue. These contentions are factually and legally insupportable.

a) Correction of Allegedly Inadvertent Error.

It is essential that the Court view the "omitted lands" issue in its stark and injurious reality, not as the benign scenario the United States tries to paint in its reply brief. The quantities involved are not insignificant, as the United States repeatedly suggests (U.S. Reply Brief, pp. 6, 16), nor do they entail "relatively minor adjustments" to the 1964 Decree. If allowed, they would increase the Tribes' water entitlements by nearly 136,000 acre-feet for the United States' claims alone and around 195,000 acre-feet for both United States' and Tribes' claims, the latter figure representing more than a 20 percent increase over the water rights decreed in 1964.

Nor is this severe impact on the State Parties necessitated by any compelling need to correct a "mistake" in the earlier proceedings, in the sense of an inadvertent oversight, as the United States insists on characterizing the purpose of its restated claim. (U.S. Reply Brief, pp. 9, 20). Rather, as we fully demonstrate in our brief on exceptions, the reason for the "omission" was a conscious, admitted decision by United States trial counsel 25 years ago not to assert claims for certain lands because they were not viewed as "practicably irrigable" under the standards and policy employed at that time. But whatever label present United States counsel may now choose to place on the decisions of their predecessors, the doctrines of *res judicata* and law of the case preclude the "second guess" they so boldly urge on the Court.

Stripped of its misleading verbiage, the United States is plainly asserting that the original Government trial counsel made a judgment as to "practicable irrigability" which, with the benefit of 25 years of hindsight after a favorable ruling by this Court on the then novel "practicably irrigable acreage" measure of Indian needs, appears to have been

too conservative, too "fair", as Special Master Tuttle puts it. (Spec. Master's Rep., pp. 48-49). The United States would like its earlier position liberalized, *nunc pro tunc*! The United States' attempt to disown previous counsel's unequivocal assurances to former Master Rifkind and the State Parties that they could rely on the "bill of particulars" presented by the United States for each reservation is not only inequitable to the extreme but lacks precedent and should be firmly rejected.

The United States mischaracterizes the purpose for which it purports to invoke Article IX, namely, "to ensure that the chosen standard [of practicably irrigable acreage as the measure of the 'reasonable needs' of the Tribes] was applied correctly." (U.S. Reply Brief, p. 7). That misstates what the United States has attempted to do in this proceeding. The United States does not contend that previous Government counsel did not apply the test "correctly." Indeed, after pleading ignorance before the Special Master as to why previous counsel made no water claims for certain lands, only recently and cleverly characterized as "omitted lands," present counsel claimed privilege and successfully opposed introduction into evidence of governmental memoranda that could have provided that answer. (Rep. Tr. 4514-4517). It is clear beyond serious question that the United States simply wishes to retry the practicably irrigable acreage issue under its more recently developed views. The State Parties urge the Court not to countenance the use of Article IX in aid of the United States' attempt to load the burden of the belated omitted lands claims on the State Parties, especially when it has chosen to withhold from this Court the reasons why such claims were not asserted by previous Government counsel. Even-handed justice demands no less.

The Tribes characterize the implementation of the "practicably irrigable acreage" standard by former Government counsel as follows (Reply Brief of the Five Tribes, p. 49):

> "Whether incidental or unincidental, the fact remains clear that the Tribes were not adequately represented."

The United States denies "any impropriety" or "breach of fiduciary duty" by their predecessors, but magnanimously reminds the Court "that the victim was not responsible for the unjust result and in no position to prevent it." (U.S. Reply Brief, pp. 20-21). Without conceding that there was any unjust result, the State Parties also wish to remind the Court that *they* certainly were not responsible for any miscues by prior Government counsel and similarly were not in a position to prevent it!

Indeed, if the Tribes have truly been denied "their full quota of water because of past governmental default" in violation of "the Nation's assumed obligation toward a dependent people", as the United States suggests (U.S. Reply Brief, p. 22), the only equitable solution is to require the United States to make appropriate compensation to the Tribes for its lawyers' alleged "mistakes". The burden of making the Tribes whole because of any presumed prior trial errors by United States counsel should not be visited on non-Indian water users in Arizona, California and Nevada. The State Parties reiterate their view that the most equitable solution to the omitted lands issue is to leave the 1964 decreed reservation rights stand and to remand the Tribes to the Court of Claims.

b) Allegedly De Minimis and Not Inequitable Effect on State Parties.

The United States attempts to downplay the effect of reopening the 1964 Decree on the State Parties by arguing that (1) the quantities of water involved in the so-called

omitted lands claims are *de minimis*, and (2) regardless of the quantities involved, there is nothing inequitable in making the requested "adjustments" at this late date.

As to the magnitude of the Special Master's omitted lands award, we have pointed out that the increase represents over 20 percent from the original decreed allocation. Although the Special Master expressly repudiated the United States' earlier claims that the quantities involved are "insignificant", he nevertheless concluded that they "appear to be relatively minor adjustments of the kind which might legitimately be expected in the aftermath of a much larger original case." (Spec. Master's Rep., p. 55). The State Parties continue to be dismayed by the apparent total disregard by both the United States and the Special Master of the impact of their recommended action.

The United States asserts that the impact of the Special Master's proposed "omitted lands" award on the State Parties is not an "appropriate inquiry" and that "the only relevant consideration weighing against exercising discretion to now correct past mistakes is a showing by the State Parties that they would have acted differently if diversion rights for the 'omitted lands' awarded by the Special Master in 1982 had been adjudicated as part of the original decree in 1964." (U.S. Reply Brief, p. 9). The State Parties contended before the Special Master that the extent to which they relied on the 1964 Decree in subsequent water resources planning and development is irrelevant to whether or not the doctrine of *res judicata* is applicable to the omitted lands claim. Although the Special Master held that *res judicata* was not applicable to the issue, which the State Parties dispute, he did not rule that detrimental reliance was an essential element of that doctrine. (Spec. Master's Rep., pp. 30-32).

The Special Master did find the States Parties' reliance relevant to whether or not it would be appropriate to reopen the 1964 Decree under the law of the case doctrine. (Spec. Master's Rep., p. 38). With respect to the State Parties' reliance, the Special Master concluded as follows (*Id.* at 46):

> Much of the discussion regarding reliance is superfluous. Not a great deal of evidence is really needed to convince anyone that western states would rely upon water adjudications. Some parties have presented in this case more specific and convincing proof of detrimental reliance than have others. Nevertheless, it would be unrealistic to conclude that those parties would not have used the 1964 Decree as a basis of future plans. Under some circumstances every party might suffer a detriment because of reliance on that Decree even though I find it difficult to determine from the testimony exactly what significant, different action the State Parties would actually have taken if the Indian Reservations had received in 1964 the water rights now requested.

The United States filed no exception to those findings. Consequently, the United States bends the rules in seeking to review this question by way of its reply brief. The seven pages of its brief (pages 9-16) devoted to attempting to refute the Special Master's assessment of the reliance issue should be stricken.[3]

To set the record straight, however, it is necessary for the State Parties to address the United States' discussion of the nature of their reliance on the 1964 Decree.

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[3]In the same vein, the United States' attempt to supplement the record by appending to its brief recent Arizona newspaper clippings relating to the impact of the Special Master's recommendations on Arizona is totally inappropriate and should be disregarded.

As we have pointed out in our brief supporting our exceptions (pages 47-53), the record demonstrates that the quantification of the Tribes' reserved rights in the 1964 Decree served as the foundation of the State Parties' efforts in developing projects to utilize available water in excess of those and other existing rights. Water projects the size of the Central Arizona Project and the Southern Nevada Water Project are not built in a short period of time, but require years of planning and construction and vast sums of money. The scope and cost of the project is dependent on the water available. Therefore, before the first shovel is placed in the ground a reliable quantity of water is mandatory.

1. *The Southern Nevada Water Project.*

Construction of the Southern Nevada Water Project began after the 1964 Decree had identified the reserved rights held by the Tribes. To meet the contract delivery amounts of 299,000 acre-feet annually through the Project facilities requires a diversion capability in excess of this amount. With existing contract diversion rights in Nevada for Colorado River water of approximately 400,000 acre-feet annually, interjection of additional priority water rights at this time may render the planning of the past and present work meaningless for the future. Characterization of the State Parties' concern for only "future impact[s]" simply misconstrues the facts. (U.S. Reply Brief, p. 15). State water projects are not the pipe dreams suggested by the United States and Tribes but ongoing efforts which were begun in reliance on the 1964 decreed rights to meet the present and future needs of hundreds of thousands of people.

The United States further contends that Nevada has almost 10,000 acre-feet of uncommitted water set aside for future developments in two areas near the Nevada Fort Mojave

reservation lands. Nevada, not presently using this water, should therefore be able to find another water source thus making the water available to satisfy the Tribes' additional claims. (*Id.*) The simplistic approach adopted by the United States misses the mark.

Federal legislation (P.L. 86-433) entitled Nevada to acquire approximately 15,000 acres of public land adjacent to the Colorado River for development. The State has expended a considerable amount of money in purchasing approximately 6,000 acres and intends to acquire the remaining acres in the near future. (Federal patents dated, October 26, 1966, May 12, 1967, June 3, 1968, April 28, 1971). Nevada undertook the task in the mid-60's to begin a gradual development of the area. The only viable water supply is the Colorado River and it cannot be denied that Nevada relied on the 1964 Decree to insure an adequate supply of water would be available during the development process. Stating that the water is "uncommitted" misconstrues the extreme reliance the State has placed on the water to provide for the present and future needs of the area.

Assumptions on potential return flows to the Colorado River have no value in quantifying the impact of the additional claims on a state's total allocation. A state presently receives "credit" only for measured return flows. As noted in the State Parties' brief supporting their exceptions (page 52), no methodology has yet been adopted to quantify "consumptive use", defined as diversions less return flows. The location of a particular parcel of land therefore has no relevance at this point. Criticism of a state official's testimony that decreed rights held by the Tribes and any additional claims may be considered consumptive use amounts is thus unwarranted in the context of the evidence. (U.S. Reply Brief, p. 14).

2. *The Central Arizona Project.*

The United States brushes aside Arizona's detrimental reliance by asserting that there is no basis for supposing that the Central Arizona Project would have been aborted if the "omitted lands" claims sustained by the present Master had been recognized in 1964. (U.S. Reply Brief, p. 10). Of course, Arizona made no claim that the Central Arizona Project would have been aborted. Arizona does, however, claim that different actions would have been taken and that strong reliance has been placed upon the 1964 Decree for the last 18 years.

Almost immediately after the entry of the 1964 Decree, Arizona relied upon it in submitting to Congress estimated water availability for the Central Arizona Project and in preparing cost-benefit ratios based upon that supply of water. After the project was authorized by Congress, Arizona further relied upon the amount of water which would be delivered through the Central Arizona Project aqueduct in taxing its citizens in order to provide revenues to ultimately pay for the reimbursable features of the Project under federal reclamation law. This was done in expectation of ultimately receiving water through the aqueduct which would sustain its economy, allow it to partially control the groundwater overdraft occurring in Central Arizona, and bring economic benefits to its citizens through the use of the anticipated supply of water. If it had been known that the supply available to Arizona would be 127,227 acre-feet less than planned on (U.S. Reply Brief, p. 12, n. 10), the lesser water supply could have resulted in substantially different conduct on the part of the State of Arizona.

A complex web of planning and engineering occurs in the construction of a federal reclamation project the size of the Central Arizona Project. One of the strands of that web

includes the question of water supply. Basic to the decision of the size of the aqueduct and pumping plants is the determination of how much water will be delivered through that aqueduct and what size pumps will be needed to pump the water. It would be an absurdity to build an aqueduct which would carry more water than could be delivered because the cost of the excess size of the aqueduct would not be justifiable to the persons who were to pay for that excess. The Central Arizona Water Conservation District imposed a tax to pay for the aqueduct and pumping plants of the Central Arizona Project. The tax was levied based upon an aqueduct which had been sized in reliance upon the receipt of the additional 127,227 acre-feet of water which would no longer be available if the Tribes are awarded the additional water which the Special Master proposes. Had Arizona known in 1964 that this amount of water would not be available to it the aqueduct would undoubtedly have been sized smaller. Public law 90-537, Section 301A; House Floor Debate Sept. 5, 1968, Remarks of Congressman Udall and Senate Report 408, pp. 40, 41.

The United States argues that what the State Parties are urging is an abandonment of the "practicably irrigable" standard (U.S. Reply Brief, p. 19), which it contends was intended to assure the Tribes of its future needs. Arizona does indeed have grave concerns about the application of this standard, for if it is applied throughout Arizona on all Indian reservations, then based upon existing decreed amounts of water for Indians, together with claims which have been asserted or stated by various Indian Tribes, and based upon the available water supplies in Arizona, only one-third of the Indian claims could be satisfied and none of the non-Indian claims. Those hard facts indeed cause Arizonans to question the "practicably irrigable acreage" standard as logical, workable or fair in the arid southwest.

The State Parties agree with the United States that they are concerned with the "future impact" of the additional claims on their water allocations. For as the Special Master recognized, "What the Tribes gain someone else will lose, at least in the future." (Spec. Master's Rep., p. 38). If the Tribes gain these additional rights an aqueduct and pumping system which is already largely constructed and which was sized for delivery of additional 127,227 acre-feet will, during the 50-year repayment period of the Central Arizona Project, be partially unfilled and unused, and Arizonans will pay for that unused capacity. No linguistic gymnastics by the United States or the Tribes' counsel can remove one portion of the planning efforts made, costs incurred, and reliance placed on the 1964 Decree for the Central Arizona Project. Arizona's reliance has been justified at every step of the way in the past and its hopes for the future are that the amount of water which has been relied upon for 18 years as being available under the 1964 Decree will in fact be delivered through the Central Arizona Project.

3. *The Metropolitan Water District.*

Despite the unchallenged finding of the Special Master, the United States is skeptical of the reliance by the Metropolitan Water District upon the water allocations of the reservations in the 1964 Decree. It notes that the action of Metropolitan was to obtain a substitute supply for the water Arizona was allocated and ultimately would use. (U.S. Reply Brief, pp. 13-14). But while the concentration was on that huge supply, it does not follow that in determining the needed substitute supply the Indian allocations were wholly ignored. Thus, Metropolitan rounded out the additional supply needed, taking into consideration the new supply the City of Los Angeles, a member agency of Metropolitan, would be obtaining from the Owens Valley. (Rep.

Tr., p. 2928). It cannot be said that an increased Indian supply of some 30 percent would have had no bearing upon Metropolitan's efforts to offset its loss or the continuance of its annexation policy.

Nor is the obvious negative impact of reduction of Metropolitan's water rights alleviated by the baseless suggestion of the United States that Metropolitan can satisfy its needs since it has ultimate contractual rights to 2.5 million acre-feet from the State Water Project and the Colorado River. (U.S. Reply Brief, p. 16). It is not large numbers in contracts that constitute adequate water supply. It is water delivered pursuant to contract *in relation to demand* that must be examined. The United States blithely ignores this second part of the equation.

Metropolitan's service area covers over 5,100 square miles, comprising most of five counties and a portion of a sixth in Southern California. It includes some 129 cities and a population of over 12,000,000 people. Its statutory purpose is to supply water for domestic and municipal purposes. It supplements the local supply of its member public agencies. This varies greatly among the agencies with some taking relatively little from Metropolitan annually while others are almost wholly dependent on Metropolitan's imported supply. In 1979 some 45 percent of the water used in Southern California was supplied by Metropolitan. (Rep. Tr., pp. 2907-2914). Metropolitan is very concerned with its ability to continue to meet the water needs of the people relying upon it. The United States' casual reference to contract rights figures independent of demand figures is naive at best and not helpful in considering the issues before us.

4. *Present Perfected Rights Argument.*

The United States argues that because the question of present perfected rights was left open in the 1964 Decree for later inclusion by way of stipulation or, if necessary,

litigation (Article VI) that the State Parties could not have really relied upon the decreed rights of the Tribes as having been a final adjudication. (U.S. Reply Brief, pp. 3-6). It argues further that a bonus from the concluding of present perfected rights is that the case will be completed and could not thereafter be reopened again as everyone fears. (U.S. Reply Brief, p. 6).

Taking the second point first, does the United States really mean that but for the provision of the Decree calling for specification of present perfected rights (Article VI) it would not have reevaluated its earlier trial decisions and not claimed on behalf of the Tribes additional water for lands it previously decided were not entitled to water? This conclusion is hard to believe in light of the legal approach of the United States throughout the renewed proceedings — that Article IX contemplates and permits the correction of errors in failing to claim the maximum water each reservation may be entitled to. (U.S. Reply Brief, pp. 7-8; Motion of the United States for Modification of Decree and Supporting Memorandum, Dec. 1978, pp. 27-28). Certainly the Tribes would not feel so constrained since their position has nothing to do with the present perfected rights listing required by the 1964 Decree, but simply that the United States failed to adequately represent them in the original case, and that their reservations are entitled to greater water allocations. (Reply Brief of the Five Tribes, pp. 48-51). Thus the bonus suggested by the United States to make its position regarding the validity of State Parties' reliance on the 1964 Decree more attractive is wholly illusory.

But an even more fundamental fallacy is present in the contention of the United States that because present perfected rights were to be listed eventually in a supplemental decree the 1964 Decree could not have been regarded by the parties as a final adjudication of Indian reservation rights

and so no one is hurt by their additional claims so many years later. (U.S. Reply Brief, pp. 3-6).

To start with, the major decision of the original case allotted the lower basin's Colorado River Compact amount among the three states — Arizona, 2.8 million acre-feet (maf), California, 4.4 maf, and Nevada, .3 maf. Present perfected rights are not additional water rights, but are charged against the allotment of the state in which they exist. *Arizona v. California*, 376 U.S. 340, 343 (1964). Thus, so far as planning is concerned, Nevada having no non-Indian present perfected rights, could and did rely upon its adjudicated entitlement in planning its water projects. California agencies, too, could rely upon the adjudicated entitlement of the State without regard to the expectation of a supplemental decree specifying present perfected rights.

In California, by virtue of the Seven Party Agreement providing for intrastate priorities to the mainstream supply written into every California water delivery contract with the Secretary of the Interior, it was clear that the first three agricultural priorities (which were the only projects with present perfected rights) were good against Metropolitan in the amount of 3.85 million acre-feet, regardless of what the lesser magnitude of their present perfected rights might turn out to be.[4] All that was important for the juniormost priorities, such as Metropolitan, to know was how much of their entitlement exceeded the statutory 4.4 million acre-feet priority in California and was therefore subject to curtailment when the Central Arizona Project became operational. As to the Indian claims in California, all parties (including the United States at that time) believed they were fixed by the 1964 Decree. Some were already encompassed in the

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[4]Wilbur & Ely, *Hoover Dam Documents* (1948), pp. A479-A483, A507.

agricultural priorities under the Seven Party Agreement (*e.g.*, The Fort Yuma (Quechan) Reservation served by the Yuma Project).

Thus, only the so-called "miscellaneous" present perfected rights were a question mark. These consist mostly of relatively minor potential uses by individuals. *Arizona v. California*, 439 U.S. 419 (1979). While certain claimed present perfected rights may have been in dispute, the order of magnitude of this category was known, both in California and Arizona, and therefore constituted no real impediment to planning use of respective water entitlement in either state. As is indicated in subsection 2, *supra*, Arizona could and did rely on its adjudicated entitlement and that of each of the Indian reservations in going ahead with the long-sought Central Arizona Project. The fact that both of these states in early negotiations asserted greater present perfected rights quantities has not the significance the United States implies (U.S. Brief, p. 5), for it represents customary preliminary negotiating posture. Each state knew its "bottom line" and in fact reduced its claims accordingly long before the entry of the Supplemental Decree in 1979. Thus the contemplated listing of present perfected rights did not, in fact, prevent the State Parties' reliance on the determinations in the 1964 Decree.

(3) Consequences of Reopening.

The State Parties contended before the Special Master that the 1964 Decree could not be selectively opened only to permit the United States and the Tribes to relitigate the magnitude of the "practicably irrigable acreage" on each reservation. We argued that if the Decree is to be opened, the State Parties should be permitted to demonstrate that subsequent decisions of this Court in *U.S. v. New Mexico*, 438 U.S. 696 (1978), and *Washington v. Washington State*

Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979), demand a closer look at the water rights implications of the 19th Century land withdrawals establishing the five reservations. In particular, the State Parties contended that such a review would result in a *reduction* in the 1964 allocations to the Tribes. The Special Master refused to consider those cases or to let the State Parties make a showing of their impact. The Master erred in opening the 1964 Decree and only compounded that error by doing so selectively.

Both the *New Mexico* and *Washington* cases were decided subsequent to this Court's decision in this case (1963) and focused solely on reserved water rights issues to a degree not possible in *Arizona v. California* where larger sovereign issues were involved.[5] The United States, in supporting the Special Master's decision, ignores *New Mexico* and implies, through a chart on "irrigable acres per capita," that the "moderate living" test of the *Washington* case has been met by the Master's omitted lands award (U.S. Reply Brief, pp. 19-20, n. 17). But, as noted, the Master refused to consider the *Washington* case or its impact in this matter. Therefore, the United States argument is improper and should be disregarded. If it is considered, then an additional reason compels allowing the State Parties their requested opportunity to demonstrate that the "practicably irrigable acreage" test, properly reevaluated and applied in light of the *New Mexico* and *Washington* decisions, results in a reduction in the Tribes' 1964 decreed rights.

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[5]In *U.S. v. New Mexico*, 438 U.S. 696 (1978), the Court held that intent at the time the reservation is established is the critical factor in creating and quantifying an implied water right. Additionally, in *State of Washington v. Fishing Vessel Assn.*, 443 U.S. 658 (1979) this Court determined that the tribes' reserved fishing right was limited to that which secures the Indians a *moderate* living.

Based on the foregoing, the State Parties submit that the contentions advanced by the United States and the Tribes in support of the omitted lands claim are without merit.

B. REPLY BRIEF OF THE FIVE TRIBES.

The reply brief of the Tribes do not raise any substantive points not discussed by the United States. Therefore no independent argument is presented to their omitted lands-Article IX argument.

II.
THE "BOUNDARY LANDS" ISSUE.

A. REPLY BRIEF OF THE UNITED STATES.

The United States takes the imperious position that once it has purported to define Indian reservation boundaries for its own administrative purposes, whether by unilateral administrative order or through quiet title litigation, those boundaries are binding on parties whose water rights are adversely affected by the boundary determinations, even though they have had no opportunity to protest or participate in the administrative or court proceedings that led to the boundary determinations. In other words, parties to water rights litigation involving *Winters* doctrine rights of Indian reservations may contest only whether the lands claimed to be practicably irrigable — the measure of the water right — are, in fact, so, but may not contest whether such lands are within the reservations whose water rights are to be determined.

To merely state the position is to demonstrate its conflict with the most elementary rules of justice. For this position shields from correction the most grievous errors in boundary determinations imaginable to the permanent detriment of others no less dependent upon the limited water supply than the Tribes.

The United States cites no decision involving *Winters* doctrine water rights in which a court has precluded a challenge to one of the essential predicates of such a claim. Instead, the United States relies essentially upon three arguments to support its novel thesis of absolute power to insulate reservation boundary determinations by the Secretary from challenge: (a) Example of the original proceeding; (b) Authority of the Secretary of the Interior to fix reservation boundaries; and (c) Language of the 1964 Decree.

(1) Example of the Original Proceeding.

The United States would have the Court regard the trial proceedings and findings of Former Master Rifkind respecting the disputed boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation as completely erroneous exercises properly avoided by Special Master Tuttle. It ignores, however, the fact that the United States, as well as the other parties, understood that to be an element of the basis for measuring *Winters* doctrine water rights — claimed irrigable acreage must obviously be within the respective reservation. Accordingly, the United States without protest joined the State Parties in trial before Former Master Rifkind of the disputed boundaries of the Fort Mojave and Colorado River reservations. Indeed, the United States wanted that determination to constitute a binding adjudication for title as well as water allocation purposes. (Answering Brief of the United States, August 1961, pp. 94-95).

This Court declined to accept the boundary findings as an adjudication of the boundaries (consistent with the position urged on the Court by the California Defendants (Opening Brief of the California Defendants in Support of Their Exceptions to the Report of the Special Master, May

22, 1961, pp. 279-81)), but adopted the Former Master's water allocations for the respective reservations *based upon those boundary determinations*.[6] Indeed, it could not do otherwise since the measure of a reservation's water right depended upon the practicably irrigable acreage actually being located *on that reservation*. This fundamental concept is further illustrated by the Court's providing for possible adjustment of the reservation water allocations upon final determination of the disputed boundaries — if the reservation is shown to be larger, any additional practicably irrigable acreage will provide a basis for an additional water allocation.

The original proceedings before Former Master Rifkind, therefore, do not support the position of the United States that the location of the claimed practicably irrigable acreage may not be examined and contested in proceedings to determine water rights.

(2) Authority of the United States to Fix Reservation Boundaries.

The United States displays some recognition of the weakness of its arguments in its effort to distinguish the "formality" of its present boundaries position with its mere "advocacy" position before Former Master Rifkind. Thus it states the boundaries of two reservations it urged in trial

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[6]Thus the Former Master allocated water for the Olive Lake and Ninth Avenue cutoff parcels and the Court adopted those allocations even though it declined to rule that those parcels were, in fact, within the boundaries of the Colorado River Reservation. Conversely, the Former Master did not allocate water for other parcels claimed by the United States to be within the boundaries of the Colorado and Fort Mojave Reservations but which he determined were not part of those reservations. Again, the Court adopted the Master's findings for water allocation purposes and did not allocate water for these parcels even though it declined to rule that the parcels were in fact, outside the reservation boundaries.

in the earlier case were not then "officially approved." (U.S. Reply Brief, p. 24). We can only wonder why disputed boundaries that are worthy of trial would lose that characteristic when unilateral administrative action, however official, is taken by an adversary party; what legerdemain of the government official removes the previously recognized genuine conflict of fact?

The important point, however, is not that self-serving "official" action was taken by the United States, but that essential elements of its claim were contested. As we have pointed out, one such element is the location of the claimed irrigable acreage. If the acreage is not within the reservation, it patently cannot support a *Winters* water right. The fact that the Secretary of the Interior has the responsibility for establishing the boundaries of Indian reservations through surveys and the like for administrative purposes does not conflict with the judicial requirement that all contested elements of the claimed water right be proven.

Thus, we have no difficulty in conceding the authority of the Secretary to conduct surveys and resurveys and to fix the boundaries of the subject Indian reservations in order to segregate them from other federal lands subject to his management authority. It does not follow, however, that in protecting its water rights a party, adverse to the claimed water rights of an Indian reservation, may not contest those boundaries for the purpose of ascertaining the pro rigable acreage to be used in measuring the reservation's water right.

A rather puzzling statement by the United States is that most of the reservation boundaries presented before Former Master Rifkind were administratively, rather than judicially, determined, yet they were accepted by the State Parties and the Court for water allocation purposes. (U.S. Reply Brief, p. 24). We believe this reveals a fundamental lack of com-

prehension of how justiciable issues are framed. The pivotal criterion is not the authority of the Secretary to determine reservation boundaries; it is whether or not the "determined" boundaries are contested by adversary parties. This latter criterion is what determines whether the boundaries are the subject of trial proceedings, not the "official" imprimatur they bear. Had the boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation not been challenged in the original proceedings before Former Master Rifkind, they would have been properly utilized in the reservations' water allocations despite lack of "official approval." But the converse is equally true — official approval cannot shield erroneous reservation boundary determinations from the right of parties adversely affected to challenge those determinations and prove the error in water rights litigation.

(3) Language of the 1964 Decree.

Finally, the United States would attribute the position denying the affected parties the opportunity to challenge the boundaries element of its new water rights claim to language in the 1964 Decree allowing adjustment of the water allocations of the Colorado River and Fort Mojave Reservations "in the event that the boundaries of the respective reservations are finally determined." (1964 Decree, Art. IID(5).) This provision quite clearly does not support the position of the United States. The Court, having declined to treat Former Master Rifkind's boundary findings as an adjudication of title, simply made the water allocations of the affected reservations subject to future adjustment. Nowhere in this or any other provision of the Decree does the Court purport to eliminate the right of adverse water claimants to participate in judicial proceedings testing expanded reservation boundaries. The United States would have us infer

this conclusion, however, by reasoning: (1) the Court did not expressly state that the boundary determination would occur in proceedings before the Court and thus must not have anticipated making the determination; (2) there does not appear to be any other judicial forum for that determination; (3) if there were such a forum, it would be an unreasonable burden to require the United States to validate its boundary determinations; (4) hence the Court must have meant that when the Secretary officially determines a boundary, it is "finally determined" as that term was used by the Court. The United States may then proceed to this Court for adjustment of the reservation's water allocations and the parties adversely affected are restricted in protecting their water supply to contesting the irrigable nature of claimed new reservation land and confirming the United States' arithmetic regarding the per acre unit diversion quantity. The addition of land to the reservation by way of Secretarial orders is to be a *fait accompli*, irrespective of how palpably erroneous. (U.S. Reply Brief, pp. 23-28).

A number of observations may be made in rejecting this syllogism. First, while the Court's statement certainly includes the possibility that final determination of the disputed boundaries may occur elsewhere, the language does not preclude determination before this Court in appropriate circumstances. Secondly, the Court's statement does not, even under the most liberal of interpretations, refer to resolution of the just-litigated boundaries by unilateral administrative action. Third, avenues of judicial determination have been pointed out by the State Parties. (Exceptions of the State Parties, pp. 69, 73 n.41, 75).

We believe that this Court, by its statement providing the possibility of water allocation adjustment upon boundary settlement, did not intend to excuse the United States from proving a contested element of its case — that the lands

presented as a basis for additional reservation water rights are in fact within the reservation. The United States, on the ground of its contended uncertainty of appropriate judicial forum, would have this Court simply dispense with that issue and deprive the State Parties of a most fundamental defense. It would seem that if the affirmative resolution of this uncertainty is to allow the State Parties to raise a crucial issue in the defense of their water rights, while the negative resolution would deprive them of that opportunity, the choice must be the former. In balancing the difficulties and detriment to the various parties, the Court should confirm that the boundary questions are subject to independent judicial determination for water rights purposes, whether it be in a United States District Court or before this Court, and that adjustment in the water allocations of the reservations may proceed only following such determination.

The United States has gone to great lengths to avoid trial of the disputed reservation boundaries. When one examines the factual and legal circumstances of their proposed boundaries, its reluctance is quite understandable. In the case of the Fort Mojave Reservation, the United States' boundary determination arbitrarily ignores the call in the description of the Hay and Wood Reserve. In the case of the Colorado River Reservation, it utilizes two different legal theories for fixing different segments of one boundary, achieving, through inconsistency, the best of both worlds. In the case of the Fort Yuma Reservation, the brand new boundaries were created by a stroke of the pen of the then Solicitor of the Department of the Interior the day before the United States filed its petition with this Court seeking additional water for the enlarged reservation. That administrative action involves several thousand acres of land accepted by Congress in 1894 by way of a cession agreement with the

Quechan Tribe, which cession had been sustained by three previous Solicitors.

But the United States well-founded reluctance to have the disputed reservation boundaries undergo the scrutiny of trial is no legal justification for depriving affected parties the cardinal legal right — their day in court.

B. REPLY BRIEF OF THE FIVE TRIBES.

No separate response is made to the brief of the five Tribes inasmuch as they merely adopt the argument of the United States as to the boundary lands question. (Reply Brief of the Five Tribes', p. 55).

C. SEPARATE RESPONSE OF THE QUECHAN TRIBE.

The Quechan Tribe asserts that the State Parties' position that the boundary determinations of the Secretary of the Interior have not been "finally determined" as contemplated by the 1964 and 1979 decrees is presented for the first time. It also states that in the original case "no State party contested the right of the Court to accept as final and binding for the purpose of this litigation the then-recognized boundaries of the Indian Reservations involved. The boundaries at that time were the result of Secretarial Orders, Court judgments, and Acts of Congress. Nevertheless, they were all deemed to be final for the purpose of water allotments then presented to the Court." (Quechan Brief, p. 33).

The Quechan Tribe makes the same error as the United States in emphasizing that other reservation boundaries established by actions of the Secretary were accepted as legally sufficient for water allocation purposes in the proceedings before Former Master Rifkind. Again, it was not the fact that they had the Secretary's imprimatur that made them acceptable, but that the State Parties believed them to be correct, and for that reason did not challenge them and create a justiciable issue as to those boundaries.

In addition, the Quechan Tribe presents a wholly improper argument that the State of California participated in previous administrative proceedings involving a claim that the Hay and Wood Reserve *of the Fort Mojave Reservation* was subject to the Swamp Land Act of 1850. (Quechan Brief, pp. 37-38). The fact that the Fort Mojave Tribe is represented in this case both by the United States and by its own counsel, and that neither set of attorneys has made this argument should weigh heavily in reviewing its merits. Moreover, inasmuch as the alleged facts referred to are not in the record of this proceeding, little shrift should be given this argument. Furthermore, even on its face, the argument is off the mark for it appears to refer to proceedings involving whether certain land is swamp and overflow land made subject to transfer to the States by Congress, and not the issue of delineation of boundaries.

The Quechan Tribe closes this argument, on behalf of the Fort Mojave Tribe, we assume, with the contention that State Parties' "current complaint is not entitled to much consideration since they didn't even see fit to take an appeal from the determination by the Secretary of Interior's Order of June 3, 1974, acknowledging ownership of the Hay and Wood Reserve by the Fort Mojave Tribe." (Quechan Brief, p. 38). This statement overlooks the fact that the Secretary of the Interior has confirmed in unequivocal language that there is neither opportunity for affected parties to participate in the promulgation of such Secretarial orders, nor is there opportunity to present any administrative appeal. (Exceptions of the State Parties, Appendix B). A judicial remedy is all that may be resorted to.

III.
DETERMINATION OF PRACTICABLE IRRIGABLE ACREAGE.

A. REPLY BRIEF OF THE UNITED STATES.

The United States takes the position that this Court should not reevaluate any of the evidence as to practicable irrigability of acreage claimed by the United States for three apparent reasons: 1) the amount of water rights subject to the State Parties' Exception is "relatively minor, . . . only . . . 22,000 acre-feet"; 2) the Special Master has already made a thorough and careful analysis of the evidence; and 3) the State Parties' quarrel is essentially that the Master found the United States' experts more convincing (U.S. Reply Brief, pp. 31-39).

The superficial appeal of these arguments is belied by a moment's thought. The State Parties would not take exception to the Master's findings if they were only of "minor" significance. 22,000 acre-feet may be a relatively small part of the total United States claim but every acre-foot is significant in a water-short area. Moreover, the amount of acreage in dispute at the time of trial between the State Parties and the United States (excluding the settled claims on the Colorado River Reservation) was only about 5400 gross acres or approximately 36,000 acre-feet (State Parties Exh. 110). The United States never acted as if it considered *that* figure a "minor" amount even though the State Parties had already conceded the practicable irrigability of over 80% of the United States' claims. So, it is quite presumptuous of the United States to now so cavalierly dismiss the State Parties' Exception relating to well in excess of half the disputed water over which this matter went to trial.

The fact that the Special Master wrote a long and fairly detailed analysis of the evidence certainly does not render

his report immune from examination as to error. Furthermore, the fact that the Master generally found the United States' experts more convincing than those of the State Parties does not foreclose analysis of expert conclusions. The State Parties cannot, and do not, take exception to the Master's finding that one set of experts was more convincing to him. But *no* expert opinion is better than the facts upon which it is based; and the Master's finding that one set of experts was *generally* more convincing does not allow him to accept those experts' factually-unsupported conclusions in *specific* areas while rejecting the conclusions of opposing experts on the ground that the latter's conclusions lack factual support.

An example of the inadequacy of the United States' reply is in the area of power rates. The United States cites various power rates in support of 30 mills as a good average figure and then states that nothing in the record supports the conclusion that its experts failed to account for wheeling costs. (U.S. Reply Brief, pp. 38-39). And yet the evidence only showed an existing power source on the Colorado River Reservation and showed that wheeling costs from there to the other reservations would be within a range of cost. (Rep. Tr., pp. 587-590, 648-49, 7057-7060). In such case, simple logic compels the conclusion that power at the source, with no wheeling costs, could not possibly cost as much as power that first had to be transported from the source to other reservations. And yet, the United States' experts assumed the *same* 30 mill power rate on *all* five reservations, and the Master so found. Error such as this must be reviewed by this Court.

B. REPLY BRIEF OF THE FIVE TRIBES.

The Tribes argue that only they looked to future water needs of the reservations through 20 to 30 year development plans while the State Parties were allegedly stuck in the

present deciding whether a prudent farmer would now decide the profitability of developing his land. (Reply Brief of the Five Tribes, pp. 56-57). The Tribes misstate the record. Of course, the State Parties examined what a prudent farmer would *now* decide, because practicable irrigability of acreage is based on current information, as the Tribes themselves point out. (Reply Brief, *supra*, at 61). The practicably irrigable standard adopted by this Court to meet present as well as future water needs of the reservations compels factual determinations as of the time water rights are allocated, not as of a date 20 or 30 years hence when different existing technologies could lead to different conclusions.[7] Where the State Parties, as well as the Tribes, must look to future development is in the case of permanent crops which take a number of years to reach full productive potential and which therefore cannot be analyzed for profitability just on the first year's return, but which instead must be analyzed over the 20 to 30 year life of the project. But this analysis of future returns is still based on projections made as of *now*, projections upon which a prudent farmer would *now* decide the profitability of developing land, and projections upon which this Court must *now* decide whether to allocate permanent water rights. The State Parties, every bit as much as the Tribes, considered the future development of reservation lands in permanent crops to reach their conclusions regarding practicable irrigability of acreage. For the Tribes to argue to the contrary is highly misleading.

The Tribes next argue that the State Parties allege "bias" merely because of the Special Master's failure to agree with their experts on all points, and then the Tribes cite instances

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[7]In fact, the State Parties have argued and continue to argue that practicable irrigability would more properly be determined as of the time the reservations were created and water rights impliedly reserved.

in which the Master ruled against them (Reply Brief, *supra*, at 62-64). In response, we note that the Master erroneously ignored cropping patterns (Spec. Master's Rep., pp. 273-74) such that under his theory, he could have ruled against the Tribes on three of the four crops and still sustained their claims. In such case, several rulings contrary to the Tribes do not belie the possibility of a predisposition to favor their overall claims. Moreover, the State Parties' allegations of unfair treatment and error do not relate to the Master's mere failure to agree with our experts, but to two far more fundamental errors in the very process by which he made findings of fact, both of which impacted directly and prejudicially in the crucial area of crop prices: 1) his decision to go beyond the *decision* of *any* of the experts, including the Tribes', in determining an almond price based on a three-year average (Exceptions of the State Parties, pp. 99-106); and 2) his willingness to ignore the most fundamental laws of supply and demand and simply not even *consider*, much less agree with our position on, the obviously relevant effect of markets on price. (Exceptions of the State Parties, pp. 107-116).

The Tribes apparently now agree with our view that "great care" must be taken as to any conclusion regarding profitability of land based on projections of crops not commercially proven in the area. (Reply Brief of the Five Tribes, pp. 65-66; Exceptions of the State Parties, pp. 94-98). But the Master's two errors, referred to above, in determining almond and grape prices, establish that he did not apply this standard. Had he done so, he would have determined prices for both crops that could not have supported a finding of profitability, that is, practicable irrigability of the lands in dispute.

The Tribes next discuss market impact and contend that staged plantings of almonds (at 250 additional acres per

year) and table grapes (at 500 additional acres per year) would preclude any glut on the market that would destroy the price structure. (Reply Brief of the Five Tribes, pp. 66-67). However, the experts for the Tribes presented no evidence as to the economic impact of staged construction of irrigation units to serve these supposed staged plantings of crops. The irrigation units designed were substantially larger than 250 or 500 acres. If these units were fully constructed initially, as designed, massive outlays of construction money would be needed for irrigation systems to serve fields that would not be planted for up to ten to twenty years. The economic analyses by which the Tribes' experts asserted practicable irrigability of lands assumed plantings contemporaneous with construction of water delivery systems. But there was no showing as to how those systems would be built in stages so that each part of the system would be ready when the area it served was to be planted. Absent such evidence, the Tribes' argument about staged plantings must be rejected.

In any event, the Tribes argue the staged planting of grapes based on the total of 95,000 acres in California and Arizona combined. They then go on to make a most startling admission:

> "the 'small Arizona grape market' upon which the States predicate their grape glut (cite) simply does not exist. Reservation grapes would be part of the overall Arizona *and California* market." (Reply Brief, *supra*, at 67).

But, if there is no separate and distinct Arizona grape *market*, how can the Tribes (and the Master)[8] assume an Arizona

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[8]The Tribes erroneously state that the Master's price of $867 "was very conservative in comparison to the $955 Arizona price. . . ." (Reply Brief, *supra*, at 68-69.) But the Master's price *is* the three-year (1977-79) Arizona average price adjusted by .92 for marketing charges (Spec. Master's Rep., pp. 226, fn. 145, 235-36, fn. 177).

grape *price*? In other words, if the Tribes wish to take advantage of the huge San Joaquin Valley grape acreage to absorb their vast new plantings without affecting price, they must *also* assume the price in the large San Joaquin market. That, of course, is exactly what the State Parties did, with the result that the considerably lower San Joaquin price ($680 instead of $867) shows grapes at 450 lugs per acre yield to be unprofitable (Exceptions of State Parties, pp. 107-116).

The Tribes cannot have it both ways. If they want an Arizona grape price, they face a small market which even assuming their unsupportable staged plantings of 500 new acres per year, would still have to absorb a 15% increase the first year and over a 300% increase in 20 years. And if the plantings were not staged, the whole increase would come at once. Either way, assumption of an unchanged Arizona grape price is undefensible. Absent a showing by the Tribes as to lack of market effect, this Court must reject the Master's adoption of the Arizona grape price and instead adopt the lower San Joaquin Valley price based on a larger market that could far better absorb the proposed new plantings.

C. SEPARATE RESPONSE OF THE QUECHAN TRIBE.

The Quechan (Ft. Yuma) Tribe has joined in the Five Tribes' Reply Brief but has also filed its own. Unfortunately, the Quechan Brief is directed more to the arguments in our Post-Trial Briefs before the Special Master than to our Exceptions filed with this Court. Considerable space is spent discussing heat units, problems of boron and topography, the qualifications of Mr. Lord, and the adequacy of Mr. Satermo's water delivery system, all of which matters we contested at trial and still disagree with, but none of which are raised by our Exceptions. All of this nonresponsive

argument (Quechan Brief, pp. 22-30) should therefore be stricken. In addition, the Quechan Brief argues the economic feasibility of citrus, dates, and asparagus and the nonapplicability of gross to net acreage reductions to Quechan "Northern Lands." (Quechan Brief, *supra*, at 31-32). The Special Master made no findings as to citrus, dates, and asparagus (nor was there sufficient evidence to support any finding as to profitability of such crops) and did apply a gross to net reduction to the "Northern Lands" (Spec. Masters' Rep., pp. 197, 254). If the Quechan Tribe had desired to challenge the Master on these points, it should have done so by filing its own exceptions. It is barred from doing so now and certainly cannot raise these matters in response to the State Parties' Exceptions. This nonresponsive argument should also be stricken.

The State Parties' challenge to the Master's finding of practicable irrigability of lands claimed only by the Quechan Tribe depends on the issue of grape prices. The initial response of the Quechans is to criticize the State Parties for "non-discussion of prices" and then to impugn the intellectual honesty of our experts. (Quechan Brief, *supra*, pp. 12-18). This is a curious tact by a party whose own experts, L. D. King and Joseph Lord, did not even run an economic analysis on any crop, by a party which instead rode the coattails of the Boyle Engineering analyses contracted for by three of the other Tribes. In any case, the reason the State Parties initially made less of prices than yields was simply because until the end of rebuttal testimony, there appeared to be no dispute as to prices between the State Parties' experts and the Tribes' experts (Boyle). It was only during rebuttal testimony that we learned that the Tribes' experts would assert higher prices if we challenged their yields. (Rep. Tr., p. 7095). Nevertheless, they stood by their original projections without change (Rep. Tr., pp.

7147-49) while we argued that our lower yields would not mean higher prices. (State Parties' Post-Trial Open. Brief, p. 203).

As to our experts' honesty, the Quechan Tribe might have avoided their reckless charges through a reading of the State Parties' Exceptions (pp. 110-111 and footnote 51). Our experts used San Joaquin Valley (Kern County) table grape prices and did not go back to the Cesar Chavez years of the early 1970's. Our experts did not repudiate their own standards by adopting the Boyle price for grapes. They adopted it because it seemed a reasonable price based on San Joaquin (Kern) grape prices of the past few years. The fact that the Boyle price was actually derived from Arizona prices for the 1971-78 period does not make its adoption by our experts wrong or unprincipled when the resulting price happens to be virtually the same figure derived from more recent San Joaquin prices. Moreover, all the Quechan calculations and statements about higher prices relate to Arizona prices, the misuse of which by the Master is the whole crux of our Exception regarding grape prices. The $943 per ton three-year average price (1977-79) is based on *Arizona* prices (Quechan Brief, *supra*, pp. 14-15; CR Exh. 56). The $930 per ton lowest of three years prices (1977-79) is an *Arizona* price as is the $869 five-year average price (1976-80) used in Appendix A, page 2 (Quechan Brief, *supra*, p. 17 and Appendix A, p. 3; CR Exh. 56.) And Arizona prices should not be used. (Exceptions of State Parties, pp. 107-113).

The Quechan Brief also cites Michael Bozick's testimony to allegedly show that even a conservative use of his price figures would show a profit on grapes. (Quechan Brief, *supra*, at 16-17 and Appendix A, pp. 1-2). But Bozick's testimony related solely to 1980 prices (Reb. Tr., p. 5530), a year in which Arizona prices shot up from the previous three years. (CR Exh. 56). None of the experts relied on

a price from just one year, and in any event, the Special Master explicitly excluded 1980 prices from consideration because of lack of 1980 actual costs for comparison. (Spec. Master's Rep., pp. 215-16). If the Quechan Tribe had wished to challenge this decision by the Master, it should have filed exceptions. This argument and appendix calculation based on Bozick's price testimony should be stricken and disregarded.

The Quechan Brief next addresses the issue of the market glut and prices, arguing that overplanting of a crop relative to market demand has nothing to do with the practicable irrigability of land (Quechan Brief, *supra*, at 19). That may be true where any number of crops can turn a profit on given land and where any overplanting of one crop can be replaced by another profitable crop. But in the present case, table grapes are the one and only crop found by the Master to be profitable on the "Northern Lands" of the Ft. Yuma (Quechan) Reservation. If grapes cannot be grown economically, then the land is not practicably irrigable under the Master's findings. So whether you really can market all these grapes in a small market without substantially affecting the assumed price is obviously a key question that directly determines practicable irrigability.

The Quechans then argue:

> "But if the effect of production on prices were to be a determining factor in whether to go into production, it is almost a certainty that the majority of all decisions by all growers to produce particular crops would be deemed economically infeasible because of the effect on the market." (Quechan Brief, *supra*, at 19).

This statement is manifestly absurd. Obviously, many crops can and are planted that have little or no effect on the price obtainable in the market where they are to be sold. But where, as here, the assumed Arizona market price is based

on a small market that would be overwhelmed with the new grape production from one or more Indian reservations, obviously such effect would be a determinative factor to a rational farmer. The Quechans' utter failure to appreciate this point apparently explains their continued aversion to any economic feasibility standard in this case, as shown in the next line of text:

> "Indeed, to us the very fact that this contention is made is the best possible argument against using economic feasibility as the criterion for determining practicable irrigability." (Quechan Brief, *supra* at 19).

IV.
CONFLICT OF INTEREST OF UNITED STATES.

The "Separate Response of the Quechan Tribe to the Exceptions Asserted by the State Parties" leads off with the argument that the United States has an ongoing conflict of interest in representing the interests of the Tribes and its other interests. (Quechan Brief, pp. 3, 5, 7.)

We are puzzled by the very presentation of such an argument since no finding was made by Special Master Tuttle as to any conflict of interest of the United States in representing the interests of the Tribes, and no party filed an exception to the absence of such a finding.[9] Hence, the Quechan Tribe is addressing a matter that has not been made an issue for resolution by this Court.

Moreover, the Quechan Tribe has failed to identify any conflict of interest in the representation by the United States in these proceedings. Its only exposition in this regard is

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[9]The Five Tribes attempt to reserve the conflict of interest issue in the event this Court determines that Article IX does not authorize the omitted lands claim. Reply Brief of the Five Tribes, p. 54 n. 33. We would note that there is no authority to reserve such an issue; this is especially so in light of the failure of the Tribes to file an exception on the failure of the Master to make a determination on this issue.

the assertion that ". . . the United States also has a duty to deliver water to their [the Tribe's] opposition pursuant to contracts made by the Secretary of the Interior . . . ." (Quechan Brief, pp. 4-5).

A simple reference to the decision of this Court in *Arizona v. California*, 376 U.S. 340 (1964), belies this contention. The United States has no obligation to favor junior priority contracting parties over holders of present perfected rights, including the Tribes. Those contracting parties with priorities lower than the Tribes and others simply are dependent upon there being adequate water to meet their contract entitlements. This is the very purpose of a system of priorities. Thus, there is no conflict between the duty of the United States to represent the Tribes' interest in Colorado River water and its having entered into water supply contracts with various non-tribal agencies.

This being the case, the Quechan's argument is without legal purpose. It merely describes differences in the claims made on its behalf by the United States and those made by itself through independent counsel. But the fact that the United States was quite properly more circumspect in its claims than the Tribe does not illustrate a conflict of interest.

For all the above reasons, the Quechan Tribe's argument entitled "Conflict of Interest" should be completely ignored.

Conclusion.

For the reasons stated herein and in our Brief in Support of Exceptions, the exceptions of the State Parties to the Report of Special Master Tuttle should be allowed and a decision entered accordingly.

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MOTION FILED
JUN 24 1982

No. 8, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ARIZONA, *Plaintiff*,

v.

STATE OF CALIFORNIA, ET AL., *Defendant*.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE

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In The Supreme Court of the United States

October Term, 1981

State of Arizona,

Plaintiff,

vs.

State of California, et al.,

Defendant.

MOTION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE BY THE 'PYRAMID LAKE INDIAN TRIBE'.

The Pyramid Lake Indian Tribe respectfully requests permission to file a brief, as amicus curiae, in support of the recommendations of the Special Master and the position of the United States and the five Indian Tribes on the question of the ability of the United States and the Tribes to assert claims for

water which were not raised in the earlier proceedings in this case. Consent to the filing of this amicus brief was refused by the State of Arizona and a majority of other parties taking exception to the Report of the Special Master.

The Pyramid Lake Tribe and its members have been severely hurt by the failure of the United States to assert water rights required for the Pyramid Lake fishery in an adjudication of rights to the use of water from the Truckee River in Nevada. The Tribe is now engaged in a series of lawsuits designed to rectify that omission. E.g., United States v. Truckee Carson Irrigation District, 649 F.2d 1286 (9th Cir. 1981), modified, 666 F.2d 351 (1982), petitions for cert. pending __ U.S.L.W. _____ (June , 1982). In that litigation, amicus and the

United States seek the recognition of rights to the use of water from the Truckee River in sufficient quantity to restore and maintain the now devasted tribal fishery in Pyramid Lake. The defendants have asserted that those claims are precluded by the failure of the United States to assert such rights in the earlier adjudication. The litigation in which the Pyramid Lake Tribe is now engaged raises issues related to the question in the present case of the ability of the United States and the Tribes to claim water for the "omitted" lands. Although the issues in the Pyramid Lakes Tribe's litigation are distinguishable, the resolution of those issues may be affected by the resolution of this case.

The argument of the Tribe here re-

sponds to the contention that the Five Tribes in this case should be denied their proper share of Colorado River water because of the uncertainty which that result might cause for parties to other water rights litigation. This brief is intended to show that the recommendation of the Special Master reflects the unique circumstances of the present controversy and does not generally implicate the authority of the United States to represent tribal interests in litigation. The discussion of this issue in the Tribe's amicus brief extends beyond that in the Master's Report and presents the issue from a different perspective than that of the parties.

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	ii
SUMMARY OF ARGUMENT	1
ARGUMENT.....	3
THE COURT SHOULD EXERCISE THE AUTHORITY OF ARTICLE IX TO PROVIDE THE FIVE TRIBES WITH THE FULL AMOUNT OF WATER TO WHICH THEY ARE ENTITLED.....	3

TABLE OF AUTHORITIES

CASES PAGE

Arizona v. California, 373 U.S. 546.. 8

Blonder-Tongue Labs v. University Foundation, 408 U.S. 313..... 12

Griffin v. Griffin, 327 U.S. 220..... 12

Hansberry v. Lee, 311 U.S. 32..... 11

Hanson v. Denkla, 357 U.S. 235..... 12

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306..... 12

Schroeder v. City of New York, 371 U.S. 208..... 12

United States v. Truckee-Carson Irrigation District, 649 F.2d 1283 (9th Cir. 1981), modified 666 F. 2d 351, pet. for cert. pending..... 11

Walker v. Hutchison, 352 U.S. 112.... 12

No. 8, Original

In The Supreme Court of the United States

October Term, 1981

State of Arizona,

Plaintiff,

vs.

State of California, et al.,

Defendant.

Brief of Amicus Curiae

SUMMARY OF ARGUMENT

The Special Master found that Article IX of the 1964 Decree in this case (376 U.S. 340) permits modification or amendment of the provisions of Article II(D) (1)-(5) which govern the allocation of water to the Five Indian reservations along the lower Colorado.

See generally Report at 29-55. The invocation of that authority is fully warranted since innocent Indian Tribes would otherwise bear the consequences of the failure of the United States to claim, on their behalf, sufficient water to meet the standard so carefully crafted by the Court and its previous Master to ensure that the Tribes are able to satisfy their present and future needs for water. 373 U.S. at 600-01.

ARGUMENT

THE COURT SHOULD EXERCISE THE AUTHORITY OF ARTICLE IX TO PROVIDE THE FIVE TRIBES WITH THE FULL AMOUNT OF WATER TO WHICH THEY ARE ENTITLED.

The Master's recommendation to modify the 1964 allocation of water for use on the Five Reservations encompassed a determination that Article IX of the 1964 Decree provided authority for the requested modifications and that the present circumstances justify the invocation of that authority. The discussion of the preclusive effect of federal representation of tribal interests by the various State Parties and amici curiae Salt River Project Agriculture Improvement District, et al, confuses these two distinct aspects of the Master's thoughtful consideration of the omitted lands question. We turn first to the meaning of Article IX.

The Master carefully examined the history and the language of Article IX in seeking to determine its meaning. Report at 29-34. He found "that the Court, by employing a broadly-drafted Article IX, retained the power to make virtually any modification in its 1964 Decree that it deemed proper 'in relation to the controversy'". Report at 35. The conclusion that the Court retained sufficient authority in its earlier decree to make the desired changes made it unnecessary to consider other concepts which would permit the Tribes and the United States to assert claims which the United States might have asserted in the earlier phase of the proceedings. Thus, this case turns on the specific language of the earlier decree and is not, contrary to the suggestions of the State Parties and

Amici, the prelude to a multitude of attacks on other decrees in other cases. It, indeed, is doubtful that even in this case, the Master's Report would provide support for similar modifications at a later date, given its focus on the special circumstances here, such as the inclusion of Article IX, the timing of the Tribal claims relative to the resolution of the non-Indian Present Perfected Rights and the complexity and magnitude of the earlier proceedings.

Having decided that in his view Article IX authorizes modifications such as those requested by the Tribes and United States, the Master addressed the question of whether he should recommend to the Court that it exercise this discretionary authority. Again, focusing on the circumstances present in this

case, he found the exercise of that authority well warranted. His conclusion in part rests on his difficulty in "determining from the testimony exactly what significant, different action the State Parties would have actually taken if the Indian Reservations had received in 1964 the water rights now requested." And, as the Master noted, at least before him, all parties admitted to "the existence of irrigable lands which were 'omitted' from the claim for water rights in the earlier proceedings". Report at 47 (emphasis in original). Finally, the Master expressed his concern that "the Tribes would bear the burden of this injustice" although they were not parties to the original hearings. Report at 48. Thus, the Master concluded:

> In my view Article IX should be used in this case as an instrument of justice to give the Tribes what rightfully belongs to them. That

> provision clearly reserves such power for the Court and this matter constitutes sufficient good reason to risk upsetting whatever reliance may have been based upon the Court's prior conclusions.

Report at 48.

His conclusion that the Tribes should not be saddled with the earlier mistakes of the United States is fully justified. In the previous proceedings, the Master and the Court concluded that although the Tribes were entitled to sufficient water to satisfy their present and future requirements, the State Parties had a need to know how much water is reserved for that purpose. The Master and the Court settled on the "practicably irrigable" standard as the vehicle to satisfy both objectives. Surely, the Tribes cannot be faulted for asking to have that standard correctly applied. No need exists to belabor the vital impor-

tance of irrigated agriculture on Indian reservations if those reservations are to become the permanent homelands envisioned at their origin. And, this Court, the Congress and the Tribes themselves have all recognized the need for agricultural development on these reservations. E.g., Arizona v. California, 373 U.S.546, 599; Tr. 1349-55. That worthy objective should not be frustrated or impeded by the failure of the United States to assert the full claim to water to which these Tribes are entitled.

The State Parties and Amici suggest that the Master's conclusions will disturb a host of matters long thought to be resolved. See Exceptions of the States of Arizona, California, and Nevada and the other California Defendants to the Report of Special Master

Elbert P. Tuttle; and Brief of Said Parties in Support of Exceptions at 36; Exception of the State of Arizona to the Report of Special Master Tuttle dated February 22, 1982 and Brief in Support of Exception at 12; Brief of Amici Curiae Salt River Project Agricultural Improvement and Power District, Salt River Valley Water User's Association and Arizona Public Service Company at 28. But the Master's decision regarding the authority of the Court to consider these claims does not implicate the doctrine of res judicata or generally bring into question the binding effect on Indian tribes of a decree obtained by the United States. Indeed, the Master expressly stated that his recommendation that "the Court exercise its power under Article IX and reach

the merits of the 'omitted lands claim'" made "unnecessary any consideration of the arguments raised by the Tribes that due process prevents preclusion of them because they were represented in the prior proceedings by a party not in privity with their interests." Report at 54, n. 71.

Thus, the res judicata issues which the State Parties discussed in detail are not raised by the Master's report. To be sure, the question of the preclusive effect on Indian Tribes of prior federal representation of their private rights is a significant and troubling question, particularly when the federal government simultaneously represents its own interests which conflict with those of the Tribes. Permitting the bar of res judicata to foreclose the

assertion of obviously valid tribal claims in such circumstances would give rise to serious due process concerns. See Hansberry v. Lee, 311 U.S. 32, 41. The significance of that question requires it to be considered on the basis of a complete record demonstrating the scope and extent of the tribal and competing federal rights and the reasons for the government's failure to assert the full scope of the tribal rights in the prior proceeding[1/].

1 Compare United States v. T.C.I.D., 649 F.2d 1283 (9th Cir. 1981), modified 666 F.2d 351 (9th Cir. 1982), Petitions for Cert. pending U.S.L.W. June, 1982. In that case the record plainly establishes that the failure of the United States to assert the tribal fishery right stemmed from its fear of the impact of such a claim on its reclamation interests. See United States v. T.C.I.D., supra, 649 T. 2d at 1290-93. In that case, unlike this one, the United States has acknowledged its conflict of interest in the prior proceedings, admitted that its conflict

--continued on p. 12

See, e.g. Blonder-Tongue Labs. v. University Foundation, 408 U.S. 313, 333 ("(T)he patentee-plaintiff must be permitted to demonstrate, if he can, that he did not have 'a fair opportunity procedurally, substantively and evidentially to pursue his claim'"); Schroeder v. City of New York, 371 U.S. 208, 212; Hanson v. Denkla, 357 U.S. 235, 247; Walker v. Hutchison, 352 U.S. 112, 116; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306; Griffin v. Griffin, 327 U.S. 220, 228-29. While certain of the Parties here touched lightly on

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Footnote 1 continued.

adversely affected its representation of Indian interests, and contended that the application of res judicata to bar the Tribe's water rights which were not previously litigated would constitute a denial of procedural due process.

some aspects of those critical considerations, no full blown factual showing was permitted (see, e.g., Tr. 1523-24) and no findings were made. Report at 54, n. 71. The result is that, outside of the invocation of Article IX, the present record is not sufficient to address the issue of the preclusive effect of the earlier proceeding, since no explanation is given for the reasons underlying the Government's failure to assert these claims previously. Of course, the lack of factual findings on the United States' conflict of interest does not diminish the inequity to the Tribes resulting from the omitted claims -- a critical consideration relative to Article IX - but because the Master's decision does not turn on the denial of due process to the Tribes,

it also does not generally implicate the question of federal representation of tribal interests when substantial conflicts of interest are admitted and proved.

CONCLUSION

The Master's decision in this case turns on the unique circumstances of this case in which the earlier decree specifically provided authority to re-examine water entitlements of the Five Tribes. So, too, the Master's recommendation that the Court utilize this authority turned on the timeliness of the request, the lack of reliance by the State Parties and the unfairness to the Tribes of the earlier allocation. Thus, the Court should not be dissuaded from "correct(ing) an unjust result" (Report at 54) by the mistaken notion suggested by the State Parties and urged by Amici that to treat these Five Tribes fairly would lead to widespread attacks on the finality of other decrees in other cases. Moreover, this

case, in its current posture, does not properly present questions relating to the effect of the federal government's conflicts of interest on the rights of Indian tribes to procedural due process.

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No. 8, ORIGINAL

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OCTOBER TERM, 1981

STATE OF ARIZONA,

PLAINTIFF,

VS.

STATE OF CALIFORNIA, ET AL.,

DEFENDANT.

BRIEF OF AMICI CURIAE

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May 20, 1982

TABLE OF CONTENTS

	PAGE
INTEREST OF AMICI CURIAE	ii
PARTIES SUPPORTED	iv
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT	1
ARGUMENT	5
THE ISSUE OF THE TRIBES' PRACTICALLY IRRIGABLE ACREAGE MAY NOT BE RELITIGATED	5
A. *The principle of finality protects decided matters from vexatious relitigation*	5
B. *The amount of the Tribes' practically irrigable acreage within their undisputed reservation boundaries was actually litigated in prior proceedings*	7
C. *The issue of the Tribes' practically irrigable acreage was finally decided by this Court's opinion and decree*	9
D. *The policies supporting finality preclude relitigation in this case*	18
E. *No exceptions to the principle of finality preclude its application in this case*	21
CONCLUSION	28

INTEREST OF AMICI CURIAE

The interest of amici in this proceeding arises from their roles as major water users and major suppliers of water to municipal, agricultural, industrial and residential users throughout Central Arizona. The Salt River Project Agricultural Improvement and Power District is a political division of the State of Arizona. The Salt River Valley Water Users' Association and Arizona Public Service Company are private corporations organized under the laws of Arizona. By virtue of various contracts, the Salt River entities operate the Salt River Project, a federal reclamation project authorized and constructed under authority of the Reclamation Act of 1902. Currently, the facilities of the Salt River Project impound the waters of the Salt and Verde Rivers for storage and delivery to water users in Central Arizona where over half of the State's population resides. Arizona Public Service Company is the largest supplier of electric power in the State of Arizona and as such is a major water user.

All three amici are applicants for allocations of Colorado River water to be delivered by the Central Arizona Project, which is presently under construction. This Project, authorized by Congress and funded by the United States and the State of Arizona, will deliver the water allocated to the State of Arizona from the Colorado River.

The amici will be affected by the Court's decision because the present case involves (1) a possible reduction of the amount of water allocated to the State of Arizona and thus of the amount available to them and (2) the preclusive effect of an adjudication and decree of water rights similar to others in the Western United States which affect the rights of the amici.

The interest of amici is in sustaining objections to Master Tuttle's proposed findings. The brief of amici curiae discusses the detrimental impact of relitigating matters addressed by this Court's 1964 decree upon them as major suppliers and users of water in the State of Arizona.

PARTIES SUPPORTED

Amici Curiae support the position taken in this Court by the States of Arizona, California and Nevada, and by the Coachella Valley Water District, the cities of Los Angeles and San Diego, and the Metropolitan Water District of Southern California in their joint brief, and the position taken by the State of Arizona in its separate brief.

TABLE OF AUTHORITIES

CASES	PAGE
Allen v. McCurry, 449 U.S. 90 (1980)	18
Benson v. Burgess, 192 Colo. 556, 561 P.2d 11 (1977)	14,15
Brown v. Felsen, 442 U.S. 127 (1979)	18
City of Los Angeles v. City of Glendale, 23 Cal. 2d 68, 142 P.2d 289 (1943)	14
Commissioner v. Sunnen, 333 U.S. 591 (1947)	9
Cromwell v. County of Sac, 94 U.S. 351 (1876)	9
Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981)	5,21,22
Heckman v. United States, 224 U.S. 413 (1912)	6,22,23,24
In Re Roney, 139 F.2d 175 (7th Cir. 1943)	15
Leupe v. Leupe, 21 C.A.2d 145, 130 P.2d 697 (1942)	15
Mitchell v. United States, 591 F.2d 1300 (Ct. Cl. 1979)	26
Montana v. United States, 440 U.S. 147 (1979)	5,6
Nebraska v. Wyoming, 325 U.S. 589 (1945)	12
New Jersey v. New York, 283 U.S. 805 (19]31)	13
System Federation No. 91 v. Wright, 364 U.S. 642 (1961)	16,17
Taylor v. Tempe Irrigating Canal Co., 21 Ariz. 574, 193 P. 12 (1920)	14
United States v. California & Oregon Land Co., 192 U.S. 3o5 (1904)	24
United States v. Fallbrook Public Utility District, 347 F.2d 48 (9th Cir. 1965)	17
United States v. Swift & Co., 286 U.S. 106 (1932)	17

TABLE OF AUTHORITIES

CASES	PAGE
United States v. Truckee-Carson Irrigation District, 649 F.2d 1286 (9th Cir. 1981)	18,24,25
Williams v. Rankin, 245 C.A.2d 803, 54 Cal. Rptr. 184 (1966)	13,15
Winters v. United States, 207 U.S. 564 (1908)	2
Wisconsin v. Illinois, 281 U.S. 696 (1930), *decree supplemented* 289 U.S. 395 (1933), *decree modified* 352 U.S. 945 (1956)	12,13
STATUTES	
28 U.S.C. § 1505	26
43 U.S.C. § 1521	19
OTHER MATERIALS	
1B *Moore's Federal Practice* (2d ed. 1980)	6,15
S. Rep. No. 408, 90th Cong., 1st Sess. (1967)	19
H. Rep. No. 1312, 90th Cong., 1st Sess. (1968)	19
Restatement (2d) of Trusts (1959)	27

No. 8, Original

In The Supreme Court of the United States

October Term, 1981

State of Arizona,

Plaintiff,

vs.

State of California, et al.,

Defendant.

Brief Of Amici Curiae

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This case began in 1952 when the State of Arizona filed a complaint in this Court against the State of California and several of its agencies to adjudicate the right to use water from the Colorado River. The States of Nevada, New Mexico and Utah and the United States were later joined as parties. The United States asserted claims to the waters of the Colorado on behalf of five Indian Tribes in Arizona, California and Nevada, as well as for National Forests, Recreational and Wildlife Areas and other government lands. 373 U.S. 546, 595 (1963).

The Court referred the proceeding to a Special Master to take evidence, make findings of fact, state conclusions of law and recommend a decree. A trial was conducted by Master Simon Rifkind from June 14, 1956 to August 28, 1958, during which a massive amount of evidence was presented: 340 witnesses provided testimony and thousands of exhibits were received. The transcript of proceedings filled 25,000 pages. After study, Master Rifkind filed with this Court a 433-page report dated December 5, 1960.

After lengthy oral argument, this Court issued its opinion on the Master's report in 1963. 373 U.S. 546. The Court generally adopted the findings and conclusions of Master Rifkind. As to water reserved by the United States for Indian reservations under the doctrine announced in *Winters v. United States*, 207 U.S. 564 (1908), the Court adopted both the Master's test quantifying reserved rights by practicably irrigable acreage and his findings of fact regarding the number of irrigable acres entitled to Colorado River water within undisputed reservation boundaries. 373 U.S. at 601. However, the boundaries of the Colorado River and Fort Mohave Indian Reservations were disputed, and this Court declined to accept the Master's resolution of those disputes. *Id.* Thus, all Indian water rights except those connected with lands in the disputed areas of the two reservations were decided by this Court in 1963.

These findings and conclusions were implemented in the Master's recommended decree, which this Court adopted and issued in 1964. 376 U.S. 340. This decree was comprehensive as to all but a few matters expressly left to later determination. Notable among the remaining matters were the parties' present perfected rights and their priority dates, a matter resolved by this Court's 1979 supplemental decree, 439 U.S. 419, and the number of acres within the disputed tribal boundaries, a matter left to another forum.

However, in 1977 and 1978 five Indian Tribes being represented by the United States filed motions for leave to intervene in subsequent proceedings. These Tribes not only claimed additional water rights in connection with acreage within previously disputed but now resolved reservation boundaries, but also claimed that they were entitled to additional water for acreage which, although recognized by all parties as part of the reservations during the 1956-1958 trial, were allegedly "omitted" from consideration as "practicably irrigable" in the trial and subsequent findings, opinion and decree. Subsequently, the United States joined in the Tribes' claims by filing a motion to modify the decree. This Court appointed the Honorable Elbert P. Tuttle as Special Master to consider these motions. 439 U.S. 419 (1979).

Although "[m]ost of the larger questions concerning water rights on the Colorado River were resolved by the 1964 and 1979 Decrees,"[1] further lengthy proceedings were held. A second trial was held from September 2, 1980 to April 7, 1981 and involved 7,300 pages of transcript and hundreds of exhibits. The trial included claims by the United States and the Tribes for additional water for the irrigable but "omitted" acreage within the undisputed reservation boundaries. However, both the number of irrigable acres and the quantity of water reserved for them had already been litigated in the proceeding before Master Rifkind twenty years earlier. In that proceeding, Master Rifkind had repeatedly insisted, and the United States had repeatedly assured, that all of the United States' evidence and claims on behalf of the Tribes would be presented. A major portion of the more than two-year trial before Master Rifkind was devoted to that goal.

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[1] Report of Elbert P. Tuttle, Special Master at 4 (February 22, 1982). This report is cited hereafter as "Master's Report."

Nonetheless, Master Tuttle found that this Court's 1964 decree could be changed to increase the Tribes' allotment for the undisputed but "omitted" lands. He believed that the lengthy trial of 1956-1958 and Master Rifkind's meticulously crafted findings could be disregarded because the United States committed an "error" in failing to present some evidence which might have resulted in a larger allocation to the Tribes in the earlier proceeding. Rejecting the salutary doctrine of res judicata as wholly inapplicable, Master Tuttle recommended a modification of this Court's eighteen year-old decree.

The United States' "error" was inexplicable, the Master believed. Master's Report at 52, n. 67. However, the only explanation offered for the government's ommission of evidence, and the only credible one in light of the availability of this evidence in 1958 and the government's repeated assurances to Master Rifkind that all evidence was being presented, is that the United States made a conscious tactical decision not to offer the evidence. There is no hint that the government's conduct was anything but an attempt to represent the Tribes' interest in the manner judged by the government to be the most effective. Nor is there any suggestion that the State parties are somehow responsible for the problem. No mistake of fact is involved here. The United States knew how many acres existed within the undisputed boundaries of the reservations, yet consciously decided not to present evidence which suggested that some were practically irrigable. At worst, the United States stands accused by the Tribes of an error of judgment in omitting these lands during the 1956-1958 trial.

The government's hindsight and the Tribes' second-guesses are not reasons for ignoring the res judicata effect of this Court's 1963 findings and its 1964 Decree. Nor does the Decree's provision for later modifications make it anything less than a final, binding judgment. The courts' historic power in equity to retain jurisdiction and modify a decree has never before been thought to destroy the de-

cree's *res judicata* effect. Nor has that power ever been extended beyond a means to accommodate substantially changed conditions which make the old decree inappropriate.

The reliance of the States, the Congress, government agencies and private water users on the 1964 Decree is too great to sweep aside their carefully developed plans, massive water construction projects and large expenditures in favor of permitting the government to relitigate a matter because it now thinks it might do a better job. The decision of the Tribes' water allotment by this Court in 1963 should not now be cast aside.

Otherwise, every water decree containing the typical provision for retained jurisdiction will be vulnerable. And every case brought by the government on behalf of an Indian Tribe will be open to relitigation. This result cannot be tolerated.

ARGUMENT

THE ISSUE OF THE TRIBES' PRACTICALLY IRRIGABLE ACREAGE MAY NOT BE RELITIGATED.

A. *The principle of finality protects decided matters from vexatious relitigation.*

Res judicata and collateral estoppel are the doctrines by which the judiciary enforces the principle of finality. This Court has repeatedly recognized that the finality principle is vital to the effective administration of justice by our courts. *E.g., Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981).

A recent statement by this Court of the importance and dimensions of the doctrines are contained in *Montana v. United States*, 440 U.S. 147 (1979).

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a

> subsequent suit between the same parties or their privies ...." *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27, 42 L.Ed. 366 (1897). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action .... Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation .... Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions.
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> 440 U.S. at 153 (citations omitted).

There are several definitions of a cause of action for res judicata purposes. Among those suggested by Professor Moore are:

> [W]hether the same right is infringed by the same wrong; whether "there is such a measure of identity that a different judgment in the second [action] would destroy or impair rights or interests established by the first" judgment; identity of grounds; whether the same evidence would suffice to sustain both judgments. 1B *Moore's Federal Practice* ¶ 10.410[11] at 1158 (2d ed. 1980).

As this Court recognized in *Montana*, the doctrines of res judicata and collateral estoppel bar relitigation by either a party to the previous action, or one in privity with him. The Indian Tribes are in privity with the United States and hence are bound by its litigation of Indian claims. *Heckman v. United States*, 224 U.S. 413 (1912).

There is little if any dispute in this case that the claim now asserted by the United States and the five Tribes for the "omitted" lands is the same "claim" presented to Master Rifkind a quarter century ago. That claim is for water reserved by the United States to satisfy the requirements of the Tribes to serve all of their practicably irrigable land

within the undisputed reservation boundaries. The dispute in this case is whether that claim has been extinguished by the final adjudication embodied in this Court's 1964 Decree.

B. *The amount of the Tribes' practically irrigable acreage within their undisputed reservation boundaries was actually litigated in prior proceedings.*

The Tribes claim additional water appurtenant to both lands within previously disputed but now decided reservation boundaries and lands within the reservation boundaries undisputed at the time of this Court's decree in 1964. This brief is concerned only with the Tribes' claim regarding lands within the boundaries which have been certain and undisputed at all stages of this proceeding. These lands have been characterized as the "omitted lands" because the United States decided not to contend in the trial conducted by Master Rifkind that they were practically irrigable. But this terminology should not obscure the fact that the entire claim for irrigable acreage within the known reservation boundaries was presented to and decided by Special Master Rifkind, whose findings on the matter were adopted by this Court, 376 U.S. 546 (1963), and implemented in its decree. 376 U.S. 340 (1964). Moreover, the fact that the United States knew that such lands existed during the 1956-1958 trial, and consciously decided not to present evidence regarding them, should not be confused by Master Tuttle's use of such terms as "omitted lands," "error" and "mistake." The water rights attached to all of the undisputed boundary lands were thus actually litigated in the proceedings before Special Master Rifkind.

The record of proceedings before Master Rifkind is replete with references by him, the United States and the other parties to the comprehensive nature of the adjudication of not only tribal water rights, but also the rights of

the States and United States.[2]

This Court recognized in its 1963 opinion that the matter of tribal water was adjudicated:

> [The Master] ruled that enough water was reserved to irrigate all the practically irrigable acreage on the reservations .... The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable. 373 U.S. at 600-601.

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[2] Even as it urged relitigation of the matter of tribal rights, the United States admitted:

> The second possibility [in the 1956-1958 trial] was to attempt a complete listing of all potential uses on the reservation so that *no need would exist to come back at a later date to seek additional rights.* As the matter progressed, Special Master Rifkind intimated a preference for the latter and *the proof of the United States was primarily directed toward that goal.*
>
> *Accordingly, the United States' evidence was intended to show the amount of irrigable lands on the reservations.* Pretrial Brief of the United States of America at 3-4 (August 25, 1980) (emphasis added).

In its post-trial brief in support of the findings it proposed to Master Rifkind, the government characterized its proof as comprehensive:

> [W]hen an Indian reservation is set aside, the water right thereby reserved is large enough to irrigate the entire irrigable acreage of the reservation. *This rule has been translated into definite quantity by the proof of the United States* with respect to the Indian Reservations of the Lower Colorado River Basin. Quoted *id.* at 4-5 (emphasis added).

The following exchange between Master Rifkind and United States Attorney Warner during the first trial shows that all Indian claims were to be presented by the government or else waived:

> THE MASTER: And although there may be other irrigable lands within those reservations, those you do not lay claim for the service of water upon?
>
> MR. WARNER: That is correct.
>
> THE MASTER: Alright. *That is ... the way we are going to be bound.* This is a statement that I will take very seriously. (Tr. at 14155; emphasis added).

The Tribes do not contend that their claims (except for the disputed boundary lands) were not actually litigated. They contend only that, because of "inadequate representation" by the United States, Master's Report at 21, the decision and decree of this Court was not final and binding. The inadequacy alleged is that the evidence presented on their behalf in the first trial did not support the "maximum possible" claim. *Id.* at 48. However, the established rule is that if some evidence in support of a claim is omitted, relitigation will nonetheless be precluded if the claim is decided. *Commissioner v. Sunnen*, 333 U.S. 591 (1947); *Cromwell v. County of Sac*, 94 U.S. 351 (1876).

C. *The issue of the Tribes' practically irrigable acreage was finally decided by this Court's opinion and decree.*

Master Tuttle's decision to relitigate the issue of "omitted lands" is based primarily on Article IX of this Court's 1964 decree. He believed that inclusion of this Article in the decree meant that the decree was not final and hence, res judicata was inapplicable. See Master's Report at 31-32. Article IX provides:

> IX. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

The Master believed that this provision broadly permits modification of the decree and thereby authorizes relitigation of the number of irrigable acres within the undisputed reservation boundaries. But in the same breath Master Tuttle acknowledged that other issues decided by the Court's prior opinion and decree are not open to relitigation: "[T]he 1964 Decree would have no meaning if it is not accorded some degree of finality." Master's Report at 35.

Which issues may be reopened and which may not? The Master's report offers no principled or reasoned basis for his distinction between the Tribes' allocation as a non-final decision among a myriad of other final decisions equally comprising the 1964 Decree.[3]

If the Master's theory is that the decree authorized its modification by language which, while not expressly addressing the matter, was broad enough to permit correction of a lawyer's tactical decision, no part of the decree is protected from renewed attack at any time. Under such circumstances, the decree which the parties labored years to obtain indeed has no meaning.

Neither the record of proceedings before Master Rifkind nor this Court's 1963 opinion suggests that the retention of jurisdiction in Article IX permits a decided issued of fact,

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[3] Article IX of the decree affords no basis for selecting "final" and "non-final" decided issues. The Article does not address the matter of finality. It only acknowledges the continuing jurisdiction of the Court and its power to enter additional orders which are "proper in relation to the subject matter in controversy."

incorporated in a cornerstone provision of the decree, to be relitigated.[4]

Had this Court desired to defer finality to subsequent proceedings twenty years later, it could have excluded specific matters from the decree. In fact, this Court did so with respect to several other issues. 376 U.S. 351 (Article VIII). The express exclusion of particular undecided issues from final decision is one of several reasons for continued jurisdiction; but this does not justify reconsidering a decided issue.

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[4] The source of Article IX is the Report of the Special Master dated December 5, 1960.

Master Rifkind recognized the need for a reliable, final decision and did not envision that Article IX would be cited to undercut finality. His 1960 report states:

> [T]he claims of the United States to water from the Colorado River for the benefit of Indian Reservations are of such great magnitude that failure to adjudicate them would leave a cloud on the legal availability of substantial amounts of mainstream water for use by non-Indian projects..... [S]ince this controversy has been properly presented in this case it is appropriate to adjudicate it here. *Id.* at 256-257.

The Master rejected the idea of a non-final decree:

> One possibility would be to adopt an open-end decree,... However, such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable. Financing of irrigation projects would be severely hampered if investors were faced with the possibility that expanding needs of an Indian Reservation might result in a reduction of the project's water supply. *Id.* at 263-264.

Instead, he intended the decree, with its provision for retained jurisdiction, to be final and certain:

> Therefore, the most feasible decree that could be adopted in this case,... would be to establish a water right for each of the five Reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the Reservation.... *This will* preserve the full extent of the water rights created by the United States and will *establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users.* *Id.* at 265 (emphasis added).

Only "proper" supplemental orders will be entered, Article IX instructs, and there are many situations in which additional orders would be proper. For example, additional orders may be required to enforce and implement the 1964 Decree. The Decree enjoined the State parties to perform certain tasks and to avoid interfering with other provisions of the Decree. *E.g.*, 376 U.S. at 346-347 (Article III); 376 U.S. at 352 (Article VII). In prior water cases in this Court's original jurisdiction, provisions similar to Article IX allowed further orders to a party to do acts necessary to implement the decree. For example, the decree in *Wisconsin v. Illinois*, 281 U.S. 696 (1930), *decree supplemented* 289 U.S. 395 (1933), was later supplemented to require state financing of a wastewater treatment plant which was ordered to be constructed in the original decree.

This Court has recognized that the power to modify a water decree is retained because conditions may change. For example, a drought might create navigation problems and reduce the available water to flows less than the total amounts allocated by the decree, requiring adjustments. In *Wisconsin v. Illinois*, the decree was temporarily modified for this reason. 352 U.S. 945 (1956). And in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), the Court entered its decree during a drought. The power to modify the decree allowed the Court to decide the matter and enter a decree even though the adjudicated water was dramatically below its historic level:

> No one knows whether [the drought] has run its course or whether it represents a new norm. There is no reliable basis for prediction. But a controversy exists; and the decree which is entered must deal with conditions as they obtain today. If they substantially change, the decree can be adjusted to meet the new conditions. 325 U.S. at 620.

Although the system of priorities decreed in 1979 in this case might allocate water in times of shortage, a dispute may arise as to implementation of present perfected rights set forth in the 1979 supplemental decree. In times of shortage, too, the Secretary of Interior may not apportion water to the States in a manner which the States agree is consistent with the Boulder Canyon Project Act, as required by the 1964 decree. 376 U.S. at 342-343 (Article II(B) (3)).[5]

Such circumstances might require additional orders or modifications of the existing decree. In fact, water decrees entered both by this Court and state courts generally contain a provision which retains jurisdiction to enter further orders modifying, enforcing or implementing the basic decree. *E.g., Wisconsin v. Illinois*, 281 U.S. 696 (1930); *New Jersey v. New York*, 283 U.S. 805 (1931); *Williams v. Rankin*, 245 C.A.2d 803, 54 Cal. Rptr. 184 (1966). But in no case known to amici has such a provision been used to reopen a decided matter where the only "changed circumstance" is a party's belief he can do a better job of presenting his case if given a second chance.

A decree adjudicating rights in unpredictable river flows cannot be inflexible, for it may work hardship if the flow of water or its uses change. But the fact that "[p]rovision will be made for [the decree's] adjustment to meet substantially changed conditions," 325 U.S. at 623, does not deprive it of finality. If conditions in the supply and use of the water *do not* substantially change, the parties to the decree are entitled to rely upon it as binding and final. Under unchanged conditions, the rights originally decreed are unaltered. The retention of jurisdiction by Article IX thus does not warrant reconsidering the number of irrigable acres on the

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[5] "It will be time enough for the courts to intervene when and if the Secretary, in making apportionments or contracts, deviates from the standards Congress has set for him to follow, including this obligation to respect 'present perfected rights' as of the date the Act was passed." 373 U.S. at 594.

basis that one of the litigants believes he might get more of the apple if permitted a second bite. There are no changed conditions in the Tribes' acreage. The only changes have occurred in the government's attitude, brought about by the Tribes' second-guessing and twenty-five years of hindsight.

And, contrary to Master Tuttle's belief, state courts do not permit modification of water decrees to correct the kind of error asserted in this case. See Master's Report at 47. None of the three cases cited by the Master support modification to correct a party's tactical mistake in presenting his case. In *Taylor v. Tempe Irrigating Canal Co.*, 21 Ariz. 574, 193 P. 12 (1920), the plaintiff brought his action not to modify the decree, but to receive the allocation he claimed under it. The court found that, unlike this case, the court entering the decree expressly intended that it would *not* be final on the amounts allocated. The court had retained jurisdiction, *inter alia*, because a dam under construction would substantially alter the amount of water ultimately available downstream. Unlike the present case, the court had declined to allocate precise amounts of water to the various claimants. 193 P. at 14.

Nor was *City of Los Angeles v. City of Glendale*, 23 Cal.2d 68, 142 P.2d 289 (1943), an application for modification as the Master's Report implies. Rather, it was a direct appeal in an action to declare water rights which attacked, *inter alia*, a retained jurisdiction provision in the decree. The court held that the judgment properly retained jurisdiction "to meet future problems," not that a tactical mistake warranted modification. 142 P.2d at 297.

Only one case cited by the Master even involved a modification. *Benson v. Burgess*, 192 Colo. 556, 561 P.2d 11 (1977). However, the *Benson* court permitted correction of a substantive error in a decree *only* because of a fundamental procedural defect in the proceeding. The published notice of commencement of the proceeding named the source of the water to be adjudicated, but the decree af-

fected water from another source. 561 P.2d at 13. Thus, the plaintiff was not even aware that his water rights were at stake until after the decree had been entered. In contrast to the plaintiff in *Benson*, the United States knew precisely the extent of the proceeding, indeed insisted that all tribal claims for irrigable acreage be adjudicated, and then represented to Master Rifkind and the other parties that it had asserted all such tribal claims. See note 1, *supra*.

More representative of the state cases is *Williams v. Rankin*, 246 C.A.2d 803, 54 Cal. Rptr. 184 (1966), which explained that jurisdiction is retained in water cases to meet changing conditions, such as "a wet or dry cycle." 54 Cal. Rptr. at 194. In water cases, such a provision is not only "wise and just" but in most cases "essential." *Id.* If this provision is used as a basis for reopening decided matters in this case, all state and federal water decrees containing this typical language could be reopened. No water rights would ever be safe from renewed challenge by any disgruntled party.

In this case, the parties, Master Rifkind and this Court clearly regarded the proceedings leading to the 1964 decree as comprehensive and final with limited and explicit exceptions.[6] The matter of tribal acreage was repeatedly recognized as a matter to be finally determined by Master Rifkind. For example, the United States admitted that both Master Rifkind and this Court understood that the Tribes' allotment was finally determined:

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[6] The reservation of a final decision on a few matters does not deprive the decision on other issues of its final character. "To be final a judgment does not have to dispose of all matters involved in a proceeding." 1B *Moore's Federal Practice* ¶0.409, p. 1002 (2d ed. 1980). *See also In Re Roney*, 139 F.2d 175 (7th Cir. 1943) (order regarding debtor's redemption held conclusive even though other matters in bankruptcy proceeding were undecided); *Leupe v. Leupe*, 21 C.A.2d 145, 130 P.2d 697 (1942) (disposition of property in interlocutory divorce decree is *res judicata*).

> The Master thought that his allocations—which except for the boundary areas reflected the entire claim of the United States for these Five Reservations—included "all the practicably irrigable" acreage on the Five Reservations. Special Master's Report at p. 262. His conclusion in that regard is not surprising since the United States had described its claim in similarly extensive terms. Thus, the Supreme Court reached its conclusions regarding the Indian rights laboring under the same notion; that the allocation of water for the Five Reservations was based on the claims presented by the United States which reflected all lands on the Five Reservations which were economically feasible to irrigate.
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> Pretrial Brief of the United States of America at 10 (August 25, 1980).

Master Rifkind and the U.S. Attorney also agreed during the first trial that the decree would be *res judicata* with respect to the Indians' claims:

> THE MASTER: Will it [the decree] be *res judicata?*
>
> MR. WARNER: It will at least serve that purpose, *yes; res judicata as establishing what is the maximum quantity of water that may be used with respect to the reservation* . . . (Tr. at 12935; emphasis added).

Continuing jurisdiction in water cases is simply an example of retained jurisdiction in equity. This Court has considered the scope of retained jurisdiction in a number of equity cases not involving water rights. For instance, in *System Federation No. 91 v. Wright,* 364 U.S. 642 (1961), the Court considered a proposed modification of a consent decree in which the trial court had expressly retained jurisdiction. This Court held that modification is proper when the circumstances underlying the decree have changed, but that this power does not undermine the res judicata effect of the decree.

> A balance must thus be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances.... Firmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided. 364 U.S. at 647-48.

In *United States v. Swift & Co.*, 286 U.S. 106 (1932), this Court refused to permit modification of an injunction in an antitrust case, even though the decree expressly retained jurisdiction. Writing for the Court, Justice Cardozo repeatedly emphasized that only substantially changed circumstances could justify modification. In view of "prejudice" to the beneficiaries of the decree, 286 U.S. at 118, "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation..." 286 U.S. at 119.

The same philosophy applies to continued equity jurisdiction in water cases. "In the ordinary case a decree allocating the waters of a stream is based upon many factual circumstances.... Since these factual circumstances are subject to change, the allocations based upon them are subject to change accordingly." *United States v. Fallbrook Public Utility District*, 347 F.2d 48, 58 (9th Cir. 1965).

Conversely, in the absence of changed circumstances, a decree has final and binding effect even though jurisdiction is retained:

> The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. *United States v. Swift & Co.*, 286 U.S. at 119.

Here, the intervenors and the United States seek to do no more than impeach the decree. No circumstances have changed regarding the "omitted lands."[7] These parties therefore may not use the power to modify the decree as an excuse to relitigate a decided issue.

D. *The policies supporting finality preclude relitigation in this case.*

Finality in judicial proceedings provides salutary benefit to litigants, courts and the public at large. The doctrine of finality "encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes." *Brown v. Felsen*, 442 U.S. 127, 131 (1979). The principle of finality "encourage[s] reliance on adjudication," *Allen v. McCurry*, 449 U.S. 90, 94 (1980), not merely by the parties but also by third persons. In cases involving property rights, for example, third parties to whom the property may be transferred have an obvious interest in the finality of disputes concerning the property.[8]

In this case, the reliance by the litigants and others on the 1964 decree is clear. As the Master acknowledged: "Not a great deal of evidence is really needed to convince anyone that western states would rely upon water adjudications. . . .

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[7] Master Tuttle did not find any changed circumstances. In fact, he implicitly found there were no changed circumstances by deciding that the United States could and should have presented evidence of the irrigable nature of the omitted lands at the 1956-1958 trial. Moreover, the Tribes and the United States should not be permitted to cloak the government's conscious decision not to present some of the evidence with the theory that changed economic feasibility has increased the number of practically irrigable acres. Under this theory, the Tribes' allocation could be reduced as well as increased. If the costs of production or the market for the products which could be produced on irrigated land changed markedly, this theory could require a substantial reduction of the Tribes' allotments. But such changes are not the extraordinary changes in the fundamental conditions underlying a decree which justify its modification.

[8] *See United States v. Truckee-Carson Irr. Dist.*, 649 F.2d 1286, 1308 (9th Cir. 1981): "[T]he policies served by *res judicata* . . . apply with special force when titles to real property are involved."

[I]t would be unrealistic to conclude that those parties would not have used the 1964 Decree as a basis of future plans." Master's Report at 46. In 1968, four years after the decree was issued, Congress authorized construction of the Central Arizona Project, a system of water delivery from the Colorado River to central Arizona water users, including twelve Indian Tribes.[9] The Congress and Arizona relied upon the water available to Arizona under the 1964 decree in planning the Project. *S. Rep.* No. 408, 90th Cong., 1st Sess. (1967).[10] To date, Congress has appropriated nearly a

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[9] 43 U.S.C. §1521.

[10] Master Tuttle argued that even if Arizona's supply of water is reduced by diverting some of it to the Tribes, the Central Arizona Project is still economically viable because the Senate found that even conservative estimates of long-term flow made the project feasible. See Master's Report at 39-40. But this misses the point. The undisputed fact is that Congress relied on this Court's opinion and decree as a final adjudication of Arizona's right to Colorado River water. In 1951, the House Committee on Interior and Insular Affairs adopted a resolution deferring consideration of the Project until the use of Colorado River water was either adjudicated or agreed upon by the States. See H. Rep. No. 1312, 90th Cong., 1st Sess. (1968), reprinted in 1968 U.S. Code Cong. and Adm. News 3666, 3678 (quoting resolution). The legislative process was suspended until this Court's opinion issued in 1963. At that time, the Congress regarded Arizona's water rights to Colorado River water as having been decided:

> By this [1963] opinion and [1964] decree, Arizona finally secured an adjudication of its entitlement to 2.8 million acre-feet of main stream water from the Colorado River.

Id. at 3679.

Moreover, the Master apparently assumed that the only concern of Congress and Arizona was economic feasibility. On the contrary, the primary concern of both Congress and Arizona was closing a "water gap," *id.* at 3670, of "desperate" proportions. *Id.* at 3671. The Committee found that "the Central Arizona Project is needed to—(1) Reduce a dangerous overdraft upon ground water reserves; (2) Maintain as much as possible of the area's irrigated farm land; and (3) Provide a source of additional water for municipal and industrial use that will be required during the next 30 years." *Id.* at 3703. Thus, the intent of Congress to meet Arizona's water needs in agricultural, municipal and industrial uses would be frustrated by the severe reduction proposed by Master Tuttle.

billion dollars for the construction of the Central Arizona Project.

Arizona has undertaken its own preparations for the Project, including the collection of property taxes during the past six years[11] and the creation of a new government agency to collect the taxes and implement the project.[12] Substantial efforts have already been made to allocate Project water within Arizona.[13] Amici curiae are applicants for allocations from the Central Arizona Project and have looked upon this Court's 1964 decree as a final determination of Arizona's Colorado River allotment. Among other things, amici have expended considerable sums in siting power plants based on the availability of Project water.

Notwithstanding the extensive planning and the commitment of a billion dollars, relitigation of the acreage matter now threatens the life of the Central Arizona Project. If the omitted lands issue is reopened, and intervenors are successful, the water available to Arizona via the Project would be decreased by 115,000 acre-feet per year, a reduction of more than twenty percent of the expected dependable flow

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[11] The tax assessment has resulted in a fund of $9,500,000.00 to help pay for the project. Tr. 2695.

[12] Tr. 2694.

[13] Tr. 2693-94. In 1980, Arizona adopted a comprehensive groundwater statute. A.R.S. Title 45, Ch. 2. Arizona's groundwater policy, which includes conservation by reductions in use, is based in part upon the assumption that water from the Central Arizona Project will be available to take the place of groundwater. A vivid illustration of this interdependence between Arizona's groundwater policy and Project water is found in the Master Contract between the United States and Arizona's water agency for delivery of Project water: paragraph 8.8(b)(ii) requires that agricultural groundwater pumping be reduced in the same amount as Project water received.

from the Project. See Master's Report at 40. It is difficult to imagine more compelling evidence of reliance upon the finality of the 1964 decree and its award of water to Arizona.

These circumstances amply illustrate the importance of finality as a principle. But finality does not attach only when it can be shown to be necessary in a given case. There is no requirement that the State parties prove their reliance on the 1964 decree; rather, finality is a principle of general application. "The doctrine of *res judicata* serves vital public interests beyond any individual judge's *ad hoc* determination of the equities in a particular case." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981).

E. *No exceptions to the principle of finality preclude its application in this case.*

The Master found that the United States failed to assert "the maximum possible claims" on behalf of the Tribes and thereby caused them to suffer an injustice. Master's Report at 48. Discounting the evidence of the final character of the earlier proceeding and of the States' obvious reliance on that finality, the Master believed it would "begin to offend the appearance of justice" if relitigation were not permitted. *Id.* The fact that the Tribes were represented by the United States instead of chosen counsel was "a compelling reason" for modifying the decree. *Id.*

The Master did not attempt to reconcile this situation with the recognized exceptions to the finality rule. He apparently believed that since he viewed this Court's prior determination as not final, the threshhold for reopening the matter did not rise to the level required when the decision is final. Indeed, the Master's reasons do not justify reopening a finally adjudicated matter. Assuming *arguendo* that the original determination was "mistaken" because of omitted evidence, this still does not warrant relitigation.

> Nor are the *res judicata* consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong ... [A]n "erroneous conclusion" reached by the court ... does not deprive the defendants "of their right to rely upon the plea of *res judicata* ..." *Federated Dept. Stores, Inc., v. Moitie*, 452 U.S. at 398 (quoting *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 325 (1977)).

That "simple justice" is no warrant for refusing to apply the principle of finality has already been decided by this Court in *Federated Dept. Stores*:

> The Court of Appeals also rested its opinion in part on what it viewed as "simple justice." But we do not see the grave injustice which would be done by the application of accepted principles of res judicata. "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*." 452 U.S. at 394.

Nor does the bare fact of government representation of tribal interests provide a "compelling reason" to regard an otherwise final decision as vulnerable. On the contrary, this Court has regarded tribal rights as particularly well-protected by the United States. In *Heckman v. United States*, 224 U.S. 413 (1912), the Court decided that a decree relating to rights in real property, including Indian interests, bound "not only the United States but the Indians whom it represents in the litigation." 224 U.S. at 446. The Court rejected the notion that the Indians were necessary parties when the United States, as their trustee, was a party:

> The argument necessarily proceeds upon the assumption that the representation of these Indians by the United States is of an incomplete or inadequate character; that although the United States, by virtue of the guardianship it has retained, is prosecuting this suit for the purpose of enforcing the restrictions Congress has imposed, and of thus securing possession to the Indians, their presence as parties to the suit is essential to their protection. This position is wholly untenable. *There can be no more complete representation than that on the part of the United States* in acting on behalf of these dependents, whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indians' acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.
>
> When the United States instituted this suit, it undertook to represent, and did represent, the Indian grantors whose conveyances it sought to cancel. It was not necessary to make these grantors parties, for the government was in court on their behalf. *Their presence as parties could not add to, or detract from, the effect of the proceedings* to determine the violation of the restrictions and the consequent invalidity of the conveyances. 224 U.S. at 444-45 (emphasis added).

This Court also held that the other parties would not risk relitigation because the Indians could not challenge the result of the government's litigation:

> And it could not, consistently with any principle, be tolerated that, after the United States, on behalf of its wards, had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question. . . .
>
> [*T*]*here is no room for the vexation of repeated litigation of the same controversy.* And when the United States itself undertakes to represent the allottees of lands under restriction, and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose, relating to the same property. 224 U.S. at 446 (emphasis added.)

The argument that this is a special case because the United States failed to assert every conceivable tribal claim is unavailing. A similar argument was rejected by the Court in *United States v. California & Oregon Land Co.*, 192 U.S. 355 (1904). The United States first initiated an unsuccessful action to declare that certain land patents were void. A second action was brought by the government, alleging that the lands were within the Klamath Indian Reservation and reserved to the United States, and therefore that the patents were void on this ground. This Court held that the second action was barred by the first, even though the United States omitted evidence of the Indian claim in the first action.

> It is said, to be sure, that the United States now is suing in a different character from that in which it brought the former suit. There it sued for itself,—here it sues on behalf of the Indians. But that is not true in any sense having legal significance. . . . The best that can be said . . ., to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way

> of forfeiture. Now it seeks the same conclusion by a different means,—that is to say, by evidence that the lands originally were excepted from the grant. 192 U.S. at 358.

An attack on a final water decree as non-binding because of the government's allegedly inadequate representation of its Indian Wards was recently rejected in *United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286 (9th Cir. 1981).[14] The question presented was whether a 1944 water decree could be adjusted because of government representation of the Pyramid Lake Paiute Tribe by the United States in litigation which had commenced in 1913. The Court of Appeals held that the decree was final and binding.

In *Truckee-Carson* the Ninth Circuit first assumed, without deciding, that the government's representation of the tribe was "improper and inadequate." 649 F.2d at 1307. Nonetheless, it held that the water decree was binding. As in this case, there was no evidence that the other parties were aware of "any impropriety in the government's representation." 649 F.2d at 1308. The importance of a final, reliable adjudication required that res judicata bar the current action by the United States and the Tribe to obtain increased water:

> The purpose of the proceeding was to obtain a decree upon which all parties could rely. This purpose would have been defeated if the government's action did not include important claims that could upset the decreed rights of the parties.
> 649 F.2d at 1302.

The Ninth Circuit thus decided that even if the United States had not adequately represented the Tribe, innocent third parties entitled to rely on the result could not be penalized for this wrong. Similarly, any losses necessary to rectify the United States' wrong should not be borne by the

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[14] Master Tuttle sat by designation in the case and joined in the Ninth Circuit's opinion.

innocent state parties in this case. Upon whom should the consequences fall? If the allocation made by the 1964 decree is a finally adjudicated matter, must the Tribes suffer in silence? Certainly not. The wrongdoer should bear the consequences of his own wrong, not his victim or an innocent third party.

Yet, the Master proposes to reopen the matter and allocate additional water to the Tribes from the States' allocations. The United States, the party responsible for the omission of evidence, would lose not a drop of the water reserved to it. The Master thus proposes to remedy one "injustice" by inflicting another.

There is no reason to punish the States for the alleged misconduct of their opponent. If the alleged tribal deficit is to be cured, the water allocated to the United States, not that of the State parties, should be reduced. In *Truckee-Carson, supra,* the Court of Appeals found that the interests of a party represented by the United States were not protected by the finality principle if the United States had inadequately represented tribal interests in the proceeding. In the present case, the remedy need not involve third parties, since the United States has been awarded enough water to satisfy the Tribes' demands. Alternatively, the Tribes may be entitled to an award of compensatory damages. The Tribes may assert their claim against the United States in a proceeding authorized by 28 U.S.C. §1505; *see also Mitchell v. United States,* 591 F.2d 1300 (Ct. Cl. 1979) (tribe's claim against government for breach of fiduciary duty is cognizable under 28 U.S.C. § 1505).

Of course, the matter of a remedy need not be reached if the United States committed no wrong. The stringent standard of representation imposed upon the United States by the Master was that the government is obligated to present "the maximum possible" claims on behalf of Indian Tribes. Master's Report at 48. The Master also described the government's duty as trustee for the Tribes as one to present "the *best* case" for the Indian claim. *Id.* at 49. The Master

did not hold that the government's representation of its own interests as well as the Tribes' is inherently a denial of due process. Indeed, such a rule would destroy the finality of many longstanding property and water decrees heretofore thought final.

Assuming *arguendo* that a breach of some duty by the government prevents a judgment from becoming final and binding, the government did not breach its obligations. First, the facts at worst show a tactical error by the United States during the 1956-1958 trial. Although the Master found that the reason for the government's omission of facts in this case "seems unimportant and perhaps unknowable," Master's Report at 52, n. 67, he rejected the only explanation offered by any party. The sole explanation is that the United States made a tactical decision to present only the evidence it felt was fairly persuasive and only the claims it believed to be reasonable. See Master's Report at 51. The government concededly made "substantial" claims on behalf of the Tribes. *Id.* at 48. The Master's fallacy is that because the government did not present every conceivable claim, it did not present "the best case."

Every lawyer knows that it is often inadvisable to present "the maximum possible" claim. Greed is readily recognized by judge and jury. If the fact-finder senses that a party seeks more than is reasonable or fairly supported by persuasive evidence, the entire claim is jeopardized and the result is often much less favorable than if a more credible claim had been presented. As a practical matter, the United States must have some degree of discretion to make such

tactical decisions if it is to represent tribal interests at all.[15]

CONCLUSION

If the provision of this Court's Decree is employed to disregard the final adjudication of the Tribes' rights which the parties labored so long to obtain, no water decree containing the ordinary provision for retained jurisdiction can be regarded as final and binding. State and federal courts will look to the decision in this case to interpret the meaning of similar provisions. Renewed attacks on even ancient decrees could cause incalculable industrial and agricultural disruptions throughout the West. If the Court reopens a decided matter here, even its own original jurisdiction water cases, long thought resolved, may come back to life.

Nor will any judgment obtained by the United States for Indian Tribes be reliable. If a final determination can be upset simply because of a tactical decision by the government, property and other rights long in repose will at once become uncertain.

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[15] Measured by a trustee's obligations at common law, the government's decision to omit some evidence is unassailable unless demonstrably incompetent. A trustee must exercise only reasonable care and skill in dealing with the beneficiary's interest. *Restatement (2d) of Trusts* §174 (1959). In fact, the Master found it not at all surprising that some evidence would be inadvertently omitted in a case of this size and complexity. Master's Report at 47. If the trustee reasonably believes that a claim for the beneficiary is doubtful, valid only in part, or wholly uncollectible, the trustee is not bound to pursue the whole claim. Restatement (2d) of Trusts at §177. The United States therefore was not obligated to make a doubtful, invalid or unreasonable claim on behalf of the Tribes. Since there is no explanation for the government's decision other than as a tactical decision, it cannot be said that the government breached its fiduciary duty to the Tribes.

Instead, the doctrine of finality should be applied to bar relitigation of water claims already decided after years of trial. And the Court's historic power in equity to revise a decree should be reserved for truly meritorious instances of extraordinary changes.

For the foregoing reasons, amici curiae believe that the exceptions should be sustained to Master Tuttle's proposed findings that the doctrine of finality does not prevent relitigation of the allotment for Indian lands already embodied in the 1964 Decree; that Article IX of that Decree permits a modification of its provisions if a party commits "error" by consciously omitting evidence in support of its claim; and that the allocations to the State parties may be reduced to increase the allotment to the Indian Tribes.

Respectfully submitted,

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CLERK

No. 8, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA AND STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO AND STATE OF UTAH,

Impleaded Defendants.

STATE PARTIES' RESPONSE IN OPPOSITION TO MOTION OF PYRAMID LAKE TRIBE FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*

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No. 8, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA AND STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO AND STATE OF UTAH,

Impleaded Defendants.

STATE PARTIES' RESPONSE IN OPPOSITION TO MOTION OF PYRAMID LAKE TRIBE FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*

The State Parties respectfully oppose the Motion filed on behalf of the Pyramid Lake Tribe (the "Pyramid Tribe") for leave to file a brief of *amicus curiae.* The State Parties base their opposition on the fact that the

issue briefed by the Pyramid Tribe is factually and legally distinguishable from the issues determined by the Special Master in the instant proceeding. Further, no party to the instant proceeding filed an exception to the Special Master's failure to determine the issue briefed by the Pyramid Tribe. Accordingly, there is no legal basis for this Court's consideration of the Pyramid Tribe issue and the Motion for leave to file an *amicus* brief should be denied.

MEMORANDUM IN SUPPORT OF STATE PARTIES' OPPOSITION TO PYRAMID LAKE TRIBE'S MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

The Pyramid Tribe and its members have been involved for some years in an action to quiet title to water rights from the Truckee River in Nevada. A major legal issue considered in the course of that proceeding concerns the right of the Pyramid Tribe to relitigate previously adjudicated water rights where there is evidence that the United States' representation of the Tribe's interests in the prior proceeding was tainted by a conflict of interest (hereinafter referred to as the "conflict of interest issue"). In its Motion for leave to file an *amicus* brief, the Pyramid Tribe concedes that this issue is distinguishable from the issues before this Court in the present proceeding. The Pyramid Tribe also concedes that its discussion of the issue extends beyond that in the Special Master's Report and presents the issue from a different perspective than that of the parties. Pyramid Tribe Motion at pages 3-4. Nevertheless, the Pyramid Tribe contends that it should be permitted to brief the conflict of interest issue because the resolution of the issues in

this case may affect the resolution of the conflict of interest issue in the Pyramid Tribe litigation. *Id.* at page 3. The Pyramid Tribe's position is totally without merit and, accordingly, the Motion should be denied.

An *amicus* brief does not provide *carte blanche* authority for review and consideration of legal issues not determined in the course of the litigation. Rather, an *amicus* brief serves the limited purpose of expanding upon facts or questions of law which the *amicus curiae* believes will not be adequately presented by the parties.

In the instant proceeding, the Tribal litigants[1] contended that because the United States' representation in the prior *Arizona v. California* litigation was tainted by a conflict of interest, the Tribes were not barred from asserting water rights for certain allegedly "omitted lands".[2] However, in ruling on the omitted lands issue the Special Master determined that Article IX of the 1964 decree provided authority for correcting "mistakes" which allegedly occurred in the prior proceeding. On this basis, the Special Master recommended that this Court revise the Tribe's reserved water rights to take into account the additional water rights attributable to the omitted lands. Significantly, the Special Master made no findings of fact or conclusions of law on the question of whether the United States' representation of the Tribes' rights in the prior proceeding was tainted by a conflict of interest. More importantly, no party to the present proceeding filed an exception to the Special

---

[1] That is, the Colorado River, Fort Mojave, Fort Yuma, Cocopah and Chemehuevi Indian Tribes.

[2] *E.g.*, Motion of the Colorado River Indian Tribes, and the Cocopah Indian Tribe for Leave to Intervene and Petition of Intervention at page 9 (April 10, 1978).

Master's Report which alleged that the conflict of interest issue should have been determined. As a result, the conflict of interest issue lost all viability and there is no legally supportable basis by which the issue can now be revived by a party. And, if a party cannot revive the conflict of interest issue, it necessarily follows that an *amicus curiae* or other non-party is absolutely without grounds for raising the issue. Finally, the Pyramid Tribe's Motion for leave to file an *amicus* brief was filed on June 24, 1982, which is more than a month beyond the deadline for submission of the parties' exceptions and briefs on the Special Master's Report. Thus, the Motion is not timely under Rule 36. On this basis alone, this Court should deny the Motion.

CONCLUSION

For the foregoing reasons, the State Parties submit that there are no reasonable or legally supportable grounds for granting the Pyramid Tribe status as an *amicus curiae.* Accordingly, the State Parties respectfully request that this Court deny the Pyramid Lake Tribe's Motion for leave to file an *amicus curiae* brief.

Respectfully submitted,

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No. 8, Original

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

STATE OF ARIZONA, *Plaintiff*,

v.

STATE OF CALIFORNIA, ET AL., *Defendant*.

MOTION FOR RECONSIDERATION

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INDEX

	Page
Motion for Reconsideration	1
Fairness Mandates Modification	2
Conclusion	5
Certificate of Counsel	6

No. 8, Original

In The Supreme Court of the United States

October Term, 1981

State of Arizona,
Plaintiff,

vs.

State of California, et al.,
Defendants.

MOTION FOR RECONSIDERATION

When this Honorable Court ordered oral argument in the case at bar for Dec. 8, 1982 it stated inter alia that the number of speakers allowed would be no more than two for each side. In response, the Quechan Tribe promptly filed a

Motion to Modify said Order to provide for "three" speakers, and this was denied on Nov. 12, 1982. The Quechan Tribe now moves for reconsideration of its Motion to Modify on the ground that this Court's denial of its said Motion has the practical effect of denying it the privilege of presenting oral argument while at the same time allowing its adversaries to enjoy this privilege. This result cannot be characterized as being anything less than unwarranted and unfair discrimination by this Court.

Fairness Mandates Modification

The Quechan Tribe understands that oral argument on their behalf is not a right but a privilege. The Court could have refused to entertain any oral argument, but this is not the situation in the case at bar where the State Parties, the Department of Justice and the Indian tribes who have acted in concert with them will be allowed oral argument by lawyers they have

selected while the Quechans are compelled to have their lawyer remain silent.

The inviolate right to select one's own lawyer is a well-recognized cornerstone of American justice. Moreover, the sacrosanct quality of this right does not even change where counsel is provided without charge by the Department of Justice to needy Indians. In fact, this legal truth was noted when the Quechan Indians first petitioned this Honorable Court to intervene in the case at bar, with independent counsel of their own choosing. The Quechans contended that they had previously been inadequately represented by the Department of Justice which had such an inherent conflict of interest that it had been precluded from making a full and complete presentation of their case in the earlier hearings. Then, in its subsequent orders, this Court recognized the independent lawyer selected by the Quechans and allowed him to present their case. Of importance is the fact that their case significantly differed from the other

cases presented by the other Indian tribes of record. This was apparent throughout the hearings when the Quechan Indians were forced to proceed alone against determined opposition from the Department of Justice which abstained from helping and deliberately opposed their claims.

Today, the Quechans are still standing alone. They are not affluent, but have nevertheless willingly sacrificed to present the best case they could afford in the hearings before Special Master Tuttle. While they didn't receive recommendations to approve all of their claims to the invaluable water of the Colorado River, they did receive considerably more than that claimed on their behalf by the Department of Justice. Furthermore, when they sincerely attempted to prove the conflict of interest bias they found that they had to do battle with both the Department of Justice and the other tribes, who for expedience had joined hands with the Department of Justice. In fact, on this point, the Quechans cannot ignore the

fact that the lawyer selected to be the speaker for the other four tribes, a former Department of Interior lawyer, definately opposed the Quechan case during the recent hearings before Special Master Tuttle. (TR VIII, 1512, 1524, 1536, 1537, 1538, 1549 and 1580) Hence, how could either he or the speaker for the government, who have both opposed the Quechan effort to prove the malignant conflict of interest issue, aggressively advocate in oral argument the Quechan claims?

Conclusion

The Quechans certainly do not intend anything derogatory regarding the speakers, but they firmly believe that they should also be allowed argument by the lawyer chosen by them if the presentation of their case is to be complete. To be denied oral argument three years and thousands of hard-to-get dollars later would amount to little more than a charade performed in the name of justice. The Quechan Indians have justifiably

relied upon this Court's orders allowing them their own lawyer and have therefore obligated themselves to pay whatever they could for his services. It would now be a travesty of justice to deny them the right to have him present final oral argument on their behalf while at the same time allowing their adversaries to be represented by counsel of their choice. It is therefore respectfully requested that this Honorable Court reconsider its order denying the Quechan's Motion to Modify to avert the discrimination which will otherwise inevitably result.

Respectfully submitted,

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November 17, 1982

Certificate of Counsel

As counsel for the Quechan Tribe, I hereby certify that this Motion for Reconsideration is

presented in good faith and not for delay.

Raymond C. Simpson
Counsel for Quechan Tribe

CARD NO. 4

NO. 8 Orig.	TITLE State of Arizona, Plaintiff v. State of California, et al.

DOCKETED	COURT
January 19, 1978	Bill of Compant

DATE	PROCEEDINGS AND ORDERS
Sept. 9, 1978	Motion of Donald D. Stark for leave to file a brief as amicus curiae filed.
Oct. 2, 1978	Motion of Donald D. Stark for leave to file a brief, as amicus curiae, is GRANTED.
Oct. 10, 1978	ARGUED.
Dec. 21, 1978	Motion of United States for modification of decree filed.
Jan. 9, 1979	The joint motion of the United States, the State of Arizona, the California Defendants, and the State of Nevada to enter a supplemental decree is GRANTED and tha said present perfected rights in each State and their priority dates are determined. Decree entered and order filed. It is further ordered that Elbert P. Tuttle, Senior Judge, United States Court of Appeals for the Fifth Circuit, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for The Master is directed to submit such reports as he may deem appropriate. The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and borne by the parties in such proportion as the Court may hereafter direct. It is further ordered that if the position of Special Master in this case becomes vacant during a recess of th Court, The Chief Justice shall have authority to make a new designation which shall have the same effect as if originally made by the Court. It is further ordered that the motion of Fort Mojave Indian Tribe et al. for leave to intervene, insofar as it seeks intervention to oppose entry of the supplemental decree, is DENIED. In all other respects, this motion and the motion of Colorado River Indian Tribes et al. for leave to intervene are referred to the Special Master. (See Per Curiam Order) Marshall, J., took no part in the consideration or decision of this case.

Title

No.

DATE	PROCEEDINGS AND ORDERS
Jan. 10, 1979	Order extending time in which to file a response to the motion of the United States for Modification of Decree and Supportint Memorandum until Feb. 14, 1979.
Jan. 22, 1979	Oath of Special Master filed.
Feb. 14, 1979	Response of states of Arizona, California & Nevada, et al. filed.
Feb. 15. 1979	Response of Colorado River Indian Tribes et al. filed.
Feb. 15, 1979	DISTRIBUTED 3/2(Motion of the U S for modification of decree).
March 5, 1979	The motion of the United States for modification of the Decree of this Court entered on March 9, 1964 is referred to the Special Master. Mr. Justice Marshall took no part in the consideration or decision of this matter.
Sept. 17, 1979	Memorandum and Report on Preliminary Issues.
Nov. 21, 1979	Exceptions of States of Arizona, Calif., and Nevada and other California Defendants to the Report of the Special Master filed. (D 1/4 Conf.)
Dec. 11, 1979	Memorandum for the U. S. in opposition to motion for leave to file exceptions filed.
Dec. 12, 1979	DISTRIBUTED. 1-4. (Memorandum and report of Special Master on preliminary issued. Motion of the State of Arizona et al. for leave to file exceptions to the memorandum and Report of the Special Master. Memorandu for the U. S. in opposition to motion for leave to file exceptions.)
Dec. 17, 1979	Memorandum of the Colorado River Indian Tribes in opposition to the motion of the States of Arizona, et al., for leave to filed exception to the memorandum and report of Special Master Elbert P. Tuttle and for stay order, file (D)
Jan. 7, 1980	The memorandum and Report of the Special Master on preliminary issues is received and ordered filed. The motion of Arizona et al for leave to file exceptions to the memorandum and Report of the Special Master is DENIED. Marshall, J., OUT.
March 17, 1982	Report of the Special Master received.
March 17, 1982	DISTRIBUTED. 4-2. (Report of Special Master).
Apr. 5, 1982	The Report of the Special Master is received and ordered filed. Exceptions, is any, with supporting briefs to the Report may be filed by the parties within 45 days. Reply briefs, if any, to such Exceptions may be filed within 30 days. Marshall and O'Connor, JJ., OUT.

NO. 8 Original	TITLE State of Arizona, Plaintiff v. State of California, et al.

DOCKETED	COURT
January 19, 1978	Bill of Complaint

DATE	PROCEEDINGS AND ORDERS
May 17, 1982	Exceptions of the United States and Support Memorandum filed.
May 20, 1982	Exceptions of the Chemehuevi, Cocopah, Colorado River, Fort Mojave and Quechan Indian Tribes filed.
May 20, 1982	Exceptions of the California agencies to the Report of the Special Master filed.
May 20, 1982	Exceptions of Arizona, California and Nevada and the other California Defendants to the Report of the Special Master filed.
May 20, 1982	Exceptions of Arizona to the Report of the Special Master dated February 22, 1982 filed.
May 25, 1982	Lodging of The Metropolitan Water District of Southern California filed.
May 24, 1982	Brief, amici curiae, of Salt River Project Agricultural Improvment and Power District, et al. filed.
June 19, 1982	Answer of Arizona, California and Nevada, et al. to Exceptions and Support Memorandum of United States, et al. filed.
June 24, 1982	Motion of Pyramid Lake Indian Tribe for leave to file a brief as amicus curiae filed.
June 24, 1982	Reply brief of the Quechan Tribe filed.
June 24, 1982	Reply brief for the United States filed.
June 24, 1982	Reply brief of the Chemehuevi Indian Tribe, et al. filed.
June 30, 1982	DISTRIBUTED. SL5P4. (Exceptions and motion of Pyramid Lake Indian Tribe for leave to file a brief as amicus curiae).
July 8, 1982	Opposition by state parties to motion of Pyramid Lake Indian Tribe for leave to file a brief as amicus curiae filed.
Aug. 10, 1982	Motion of Arizona, et al. for leave to file a brief in response to reply briefs of the United States, et al.
Aug. 11, 1982	DISTRIBUTED. SL17P4. (Above motion).
Sept. 27, 1982	Supplemental memorandum filed by the U. S. (D).
Oct. 4, 1982	The motion of Pyramid Lake Indian Tribe for leave to file a brief as amicus curiae is GRANTED. The Exceptions to the Report of the Special Master are set for cral argument in due course. The motion of Arizona, et al. for leave to file a brief in response to the reply briefs of the United States, et al. is GRANTED. Marshall J., OUT.

(Over)

8 Original

Title

No.

DATE	PROCEEDINGS AND ORDERS
Oct. 6, 1982	Motion of the parties for divided argument and for additional time for oral argument filed.
Oct. 18, 1982	The joint motion for additional time for oral argument and for divided argument is granted and a total of one and one-half hours is allotted for oral argument and no more than two cousel per side shall present oral argument. Marshall, J., OUT.
Nov. 8, 1982	Motion of Quechan Tribe for reconsideration of order granting divided argument filed.
Nov. 15, 1982	The motion of Quechan Tribe for modification of the order granting divided argument is DENIED. Marshall, J., OUT.
Nov. 19, 1982	Motion for reconsideration by Quechan Tribe received.
Dec. 8, 1982	ARGUED.